(26,089)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 622.

DONATTO FILLIPPON, PETITIONER,

vs.

ALBION VEIN SLATE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Certified Copy.

TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. —.

DONATTO FILLIPPON, Plaintiff in Error,

vs.

ALBION VEIN SLATE COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Office Supreme Court U. S. Filed Aug. 13, 1917. James D. Maher, Clerk.

1

Docket Entries.

In the District Court of the United States, Eastern District of Pennsylvania.

3636.

DONATTO FILLIPPON

vs.

ALBION VEIN SLATE COMPANY.

Smith, Paff & Laub.
F. P. Prichard.

1915.	May	10.	Præcipe for summons filed.
			Summons exit returnable the first Monday of June next.
			Statement of claim filed.
			Rule to plead filed.
			Summons returned "served" and filed.
"	June	8.	Order for the appearance of Frank P. Prichard, Esq., for defendant filed.
1916.	April	19.	Plea filed.
			Order to place case on trial list filed.
"	Oct.	9.	Jury called.
"	"	10.	Verdict for defendant.
"	"	13.	Motion and reasons for new trial filed.
"	"	30.	Bill of Exceptions filed.
"	Nov.	3.	Order of Court sealing Bill of Exceptions.
"	"	27.	Argued sur motion for new trial.

2

" Dec. 6. Opinion Witmer, J., denying motion for new trial filed.
" " 21. Præcipe for judgment filed. Judgment accordingly.
1917. Jan. '18. Petition for Writ of Error filed.
Order of Court allowing Writ of Error filed.
Assignments of Error filed.
Bond for costs sur Writ of Error filed.
Order of Court approving bond sur Writ of Error filed.
Writ of Error allowed and issued and copy thereof lodged in clerk's office for adverse party.
Citation allowed and issued.
Præcipe sur Transcript of Record filed.
" " 20. Citation returned "service accepted" and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Donatto Fillippon, plaintiff, and Albion Vein Slate Company, a manifest error hath happened, to the great damage of the said Donatto Fillippon, plaintiff, as by his com-
3 plaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States at Philadelphia, the 18th day of January, in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before WITMER, *J.*

Allowed by:
THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

4 In the District Court of the United States for the Eastern District of Pennsylvania. March Sessions, 1915.

No. 3636.

DONATTO FILLIPPON

vs.

ALBION VEIN SLATE COMPANY.

Statement of Plaintiff's Claim.

Filed May 10, 1915.

The above-named plaintiff claims of the above-named defendant the sum of Ten Thousand Dollars ($10,000.00) damages upon a cause of action of which the following is a statement:

First. That Donatto Fillippon, the plaintiff above named, is and was at all times hereinafter mentioned in this statement, a citizen of the Kingdom of Italy and a subject of the King of Italy.

Second. That the Albion Vein Slate Company, the defendant above named, is and was at all times hereinafter mentioned in this statement, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having its plant at or near the Borough of Pen Argyl, in the County of Northampton and State of Pennsylvania, and its principal place of business in the Borough of Bangor, County of Northampton and State of Pennsylvania, and in the Eastern District thereof.

Third. That on or about the 31st day of July, A. D. 1914, and for a considerable period of time prior and subsequent thereto, the defendant corporation was engaged in the mining and quarry-
5 ing of slate and slate products and in the manufacture of same, and operated a slate quarry near the Borough of Pen Argyl, in the County of Northampton and State of Pennsylvania.

Fourth. That on or about, to wit, the 31st day of July, A. D. 1914, and for some time prior thereto, the plaintiff, was employed by the defendant company as a rubbish hand, the duties of which employment consisted of loading rubbish in "boxes" preparatory to hoisting same out of the quarry or hole and depositing same on the outside.

Fifth. That it was the duty of the defendant company to furnish a reasonably safe place to work; to warn and instruct the employees as to any and all latent dangers, as well as to any defects in methods, appliances and machinery, of which the employees could not have been held to have had notice, or which were not apparent to them; to reasonably guard against such dangers and take all the necessary precautions against any dangers, of which the employer had superior knowledge; that it was the duty of the defendant company to use such methods, appliances and machinery as were in common and ordinary use by those in the same line of business and not more dangerous, and that it was the duty of the defendant company to

apprise its employees of dangers, which, though not imminently dangerous, were known to the defendant and not known to the plaintiff.

Sixth. That disregarding these duties as aforesaid, the defendant, on or about, to wit, the 31st day of July, A. D. 1914, carelessly and negligently employed methods, means, instrumentalities and machinery not in common and ordinary use, but more dangerous than those in common and ordinary use, in that the defendant in
6 preparing blocks of slate for manufacture into a commercial product, instead of using props and levers at the proper and necessary points under the block of sufficient size and strength to maintain and support the block while raising same, used a wedge, which alone is not used, designed or intended for the purpose of supporting the block, by and because of the use of which improper, defective and negligent method or instrumentality the plaintiff, who had been directed to place the wedge under the block, and while he had his arm under the block to push the wedge under same as a support for the block of slate, and while he was in the act of pushing the wedge under the said piece of slate as he had been directed to do by his superior, the said block of slate, because of the inadequate and insufficient and improper support afforded by the using of the wedge instead of a sufficient and proper support, tilted and mashed the plaintiff's right arm near the elbow.

Seventh. That disregarding the duties imposed upon it by law, the defendant company, to wit, on or about the 31st day of July, A. D. 1914, failed to warn the plaintiff of the latent dangers due to the use of the insufficient instrumentality and the dangerous method not in common and ordinary use by others in the same line of business, and failed to instruct the plaintiff of the dangers to which he was subjected by the use of a defective and improper method and instrumentality, and failed to fully apprise and warn the plaintiff of the dangers to which he was subjected by his employment.

Eighth. That the defendant, disregarding its duty, on the said 31st day of July, A. D. 1914, transferred the plaintiff from the duties for which he had been employed and with the risks of which he was familiar, and directed him to work at a place, with the risks
7 of which employment he was not familiar, and of which dangers and risks he had not received any instruction or warning, in that the plaintiff on or about, to wit, the said 31st day of July, A. D. 1914, was taken from his employment, which was that of loading rubbish into boxes, and set to work at a more dangerous employment, which was that of putting the support under blocks of slate for the purpose of giving sufficient room under the block, and which part of the operation of a slate quarry requires experienced and specially instructed employees to guard against the latent dangers of such employment.

Ninth. That the defendant, disregarding its duty, still further, to wit, on the said 31st day of July, A. D. 1914, ordered and directed the plaintiff, an uninstructed and inexperienced employee, to do the work in the manner said work was performed by the plaintiff and under the direct orders and instructions of the defendant, by yielding to the superior judgment of the defendant, to whose orders and directions the plaintiff was bound to yield and conform.

Tenth. That by reason of and because of the aforesaid negligent and careless acts of the defendant, and without any negligence on his part, the plaintiff, while in the employ of the defendant and in the performance of the new and unfamiliar duties of his employment without warning and instruction under the direct orders of his superiors, was injured on the said 31st day of July, A. D. 1914, by the tilting of the block of slate while in the act of setting a support for the block of slate so that the plaintiff's arm was crushed at or near the elbow, which necessitated the amputation of the arm above the elbow, so that the plaintiff is permanently disabled and prevented from earning a livelihood for himself, and has resulted in great pain and suffering to the plaintiff and in his physical disfigure-
8 ment, to the plaintiff's damage in the sum of Ten Thousand Dollars ($10,000.00), which the plaintiff seeks to recover in this action.

All of which the plaintiff expects to be able to prove at the time of the trial of this case.

DONATTO FILLIPPON.

STATE OF PENNSYLVANIA,
County of Northampton, ss:

Donatto Fillippon, the plaintiff above named, being duly sworn according to law, deposes and says that the facts set forth in the foregoing statement are true and correct as he verily believes.

DONATTO FILLIPPON.

Sworn and subscribed before me this 8th day of May, A. D. 1915.

[SEAL.] J. E. STRAUB,
Fifth Ward, Easton,
Alderman Northampton Co., Pa.

My commission expires First Monday of Jan., 1918.

Plea.

Filed April 19, 1916.

The defendant in the above case pleads "Not Guilty."

FRANK P. PRICHARD,
Attorney for Defendant,
Per JOSEPH NEFF EWING.

To Clerk U. S. District Court, April 18th, 1916.

9 *Bill of Exceptions.*

Filed Oct. 30, 1916.

Be it remembered, that in the term of March Sessions, A. D. 1915, came the said plaintiff into the said Court and impleaded the said

defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the City of Philadelphia aforesaid, before the Honorable C. B. Witmer, Judge of the said Court, on Monday, the ninth day of October, A. D. 1916, the aforesaid issue between the said parties came to be tried by a jury of the said District for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issues, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff and defendant offered the following evidence:—

PHILADELPHIA, PA., Monday, October 9, 1916.

Before Hon. Charles B. Witmer, J., specially presiding.

Present:

Calvin F. Smith, Esq., and J. Willard Paff, Esq., representing the plaintiff.

Frank P. Prichard, Esq., representing the defendant.

10 Transcript of Testimony, rulings of the Court, and Exceptions.

Jurors sworn and affirmed Monday, October 9, 1916.

Mr. Paff opened the case on behalf of the plaintiff.

Mr. Prichard opened the case on behalf of the defendant.

At 12.45 p. m. a recess was taken until 1.30 p. m.

1.30 p. m.

Present: Parties as before noted.

Plaintiff's Evidence.

Mr. Paff: I would like to call Mr. Pasana to act as interpreter.

MARIO PASANA, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Are you an official interpreter?
A. No, I am not.
Q. What is your business?
A. I am a law clerk.
Q. You are connected with what office?
A. With a firm of lawyers in New York City.

Q. You come from New York?
A. Yes.
Q. You live in New York?
A. Yes, I live in New York.
Q. Are you interested in this case at all?
11 A. No, I am not.
Q. How do you come to be an interpreter here?
A. He (plaintiff) came first to our office. I was the interpreter from the beginning to now for him.
Q. You mean your office? You mean he came to your office in New York, for your office to take the case? He came to your office in New York, to take the case?
A. Yes, exactly.
Q. Is your office still interested in the case?
A. No, it is not.

Mr. Prichard: I would like to have an official interpreter if I could have one. I do not like to have an interpreter connected with the parties, who might be more or less interested. I do not mean to cast any aspersions on this gentleman, for I do not know him at all. The witness has been in this country for two years and a half, I understand. Perhaps he speaks English.

Mr. Paff: Not very well.

Mr. Prichard: I have not been able to get hold of an official interpreter. I do not want to delay the Court. We will go ahead with this man, but I will ask your Honor to caution him to repeat exactly what the witness says, not a free translation, but an actual translation.

The Court: Very well. Isn't the plaintiff able to speak any English whatever?

Mr. Smith: I think very little.

Mr. Paff: Very little.

The Court: When it comes to the important part of the case, let the plaintiff answer in English, if possible. Of course, if he cannot get along that way, we will help him.

Mr. Prichard: My information was that the plaintiff spoke
12 broken English. He has been in the country for two years and a half. My information is that he speaks broken English.

The Court: He can do a little bit in that direction. When it comes to the important part of the case, let him answer in English, if possible.

DONATTO FILLIPPON, the plaintiff, sworn and examined through the interpreter, as follows:

By Mr. Paff:

Q. How old are you?
A. Twenty-three.
Q. Where were you born?
A. Over in Italy.
Q. What part of Italy?
A. The northern part of Italy.

Q. Were your parents born in the northern part of Italy? Were your father and mother born in Italy?
A. Yes.
Q. When did you come to America?

By the Court:

Q. How many years ago?
A. Four years ago.
Q. You are in this country four years? How many years are you here in the United States?
A. I came in November or December, about the 16th of December.
Q. What year? How many years ago?
A. Oh, about four years.

By Mr. Paff:

Q. Where did you go to after you came to America? When you came to America, where did you go to in America?
A. Pen Argyl.
Q. When did you go to Pen Argyl?
A. To see my brother.
Q. When?

13 By the Court:

Q. What year?
A. About four years, pretty soon.

By Mr. Paff:

Q. About four years pretty soon?
A. Yes.
Q. What did you do when you came to Pen Argyl?
A. Working.
Q. Working where?
A. In the quarry.
Q. What quarry? Which quarry?
A. Jackson-Bangor.
Q. Is that a slate quarry?
A. Yes.
Q. How soon after you came to Pen Argyl did you begin to work?
A. Oh, about three or four months.
Q. Then you worked at Jackson-Bangor?
A. Yes.
Q. How long did you work there?
A. Three or four months.
Q. Now, I want to see if you understood my first question. How long was it after you came to see your brother at Pen Argyl that you began to work in the quarry?
A. The day after.
Q. The day after you came. And you worked in the Jackson-Bangor quarry how long?
A. About four months.
Q. Then what did you do?

A. I was a rubbish hand.
Q. You were a rubbish hand at Jackson-Bangor?
A. Yes.
Q. After you left Jackson-Bangor Slate Quarry, where did you go?
A. Albion Vein Slate Company.
Q. How long did you work there?
A. Oh, about a year and three or four months.
14 Q. You worked there until the time of this accident, did you? You worked there until the time of your injury to your arm?
A. Yes.
Q. All the time. Did you work there all the time?
A. Yes.
Q. Every day?
A. Yes.
Q. Sunday?
A. Oh, no. One time on Sunday.
Q. What did you do there?
A. Worked on top of the hole.

By the Court:

Q. At first, when you came there, what did you do?
A. The same work.

By Mr. Paff:

Q. That which you did at Jackson-Bangor?
A. Yes.
Q. At Jackson-Bangor, did you handle the rubbish on the bank or in the hole?
A. In the hole.
Q. Then you came to the Albion Vein Slate Company and handled rubbish in the hole?
A. Yes, sir.
Q. Do you remember on or about July 31, 1914?
A. Yes.
Q. Where were you working on that day? On the day that this injury happened to your arm, where were you working?
A. With Humphrey Davis.
Q. Who was Humphrey Davis?
A. The block man.
Q. In what part of the hole, of the quarry hole, was Humphrey Davis, the block man?
A. The Albion Vein Slate Company.
Q. In what part of the hole?
A. No. 4.
15 Q. What do you mean by No. 4?
A. No. 4 was the place where I was working.
Q. So that there were different places in the hole designated by number?
A. Every place is numbered.
Q. Did Humphrey Davis work at all the numbers, or only No. 4?

A. He was working at the different numbers, but this day he was working at No. 4.
Q. At No. 4?
A. Yes.
Q. Where were you working that day?
A. With him.
Q. What were you doing?
A. Rubbish man.
Q. What does that consist of?
A. To load the boxes with small stone, of small rocks, and to put the wedge under the stone.
Q. Loading boxes with rubbish?

Mr. Prichard: And putting the wedges under the stone.
Mr. Paff: I am going to come to that. I will take that up separately.

By Mr. Paff:

Q. Where did the rubbish come from that you put in the boxes?
A. They do that. They make the rubbish.
Q. How?
A. After blasting.
Q. After blasting. Now, what did Humphrey Davis say to you?
A. He told me to take the wedge and put under the stone.
Q. Were you there at the stone when he asked you or were you called from some other place near by?
A. I was near by.
Q. How far away?
16 A. To load the box.
Q. How far away were you?
A. About three or four feet.
Q. Three or four feet?
A. Yes.
Q. Away from the place?
A. Yes.
Q. What was Humphrey Davis doing there?
A. He was moving the stone.
Q. How?
A. He had to split the rock and the bar was lifting.
Q. Lifting it up. Was anyone helping him do that?
A. His son.
Q. How large was this block that they were lifting?
A. You mean how long?
Q. How long and how wide and how thick?
A. About five feet long, four feet wide.
Q. How thick?
A. About six or seven inches.
Q. Six or seven inches thick?
A. Yes.
Q. How was the rock under this rock or stone that they were lifting, with reference to being level, or did it have a dip?
A. It was inclined to one side.
Q. About how much? Indicate with that book.

A. About like that (indicating with book).
Q. What did Humphrey Davis say to you then?
A. He told me to put this wedge under the rock.
Q. Who called you to come over to the stone for that purpose?
A. Humphrey Davis.
Q. What did Humphrey Davis say to you?
A. He told me to put the wedge under the stone.
Q. Describe the wedge. What was it?
A. It is like a rail, that is finished by an angle.
Q. What kind of a rail?
A. Like the railroad rails.
Q. Like railroad rails. How long was it?
17 A. It was about one foot long.
Q. One foot long. How thick?
A. About four or five inches thick.
Q. Tell us about what you did with that wedge?
A. I put it under the stone to lift it up.
Q. What is that?
A. I put it under the stone to lift it up.
Q. How far under the stone?
A. About like that (indicating about five or six inches).
Q. What was said to you, or what did you say?
A. I put this wedge under the rock and I got scared, being the largest stone, and I want him to get something to push the wedge under the stone, and he told me to go ahead, put the stile under the stone.
Q. Or wedge?
A. Wedge.
Q. What did you say to Humphrey Davis about getting something?
A. I told him I was afraid to put the stile under there.
Q. What did he say?
A. He told me to go ahead and put the stile under there.
Q. And was anything else said?
A. No, he did not say anything else.
Q. Nothing else?
A. No.
Q. Then what happened?
A. Then the rock fell on my arm.
Q. It fell on your arm?
A. Yes.
Q. At what point? On which arm? The right arm or left arm?
A. On the right arm.
Q. On the right arm?
A. Yes.
Q. At what point?
18 A. Near the elbow.
Q. Then what happened?
A. And the rock started to slide down on my arm.
Q. The rock started to slide down on your arm. How far?
A. Well, up to the muscles.
Q. Did you say to Humphrey Davis you were afraid before you put your arm in under, or after you put your arm in under?

A. After that I put a little bit the wedge under the stone.
Q. After you put it a little bit under the stone. Did you take your arm out, then ask to get something, as you said?
A. Yes, I want to go and get something. I want to go and get something.
Q. And was it then that Humphrey Davis said you should put it under?
A. Then he say, "Go ahead, go ahead, put under the stile".
Q. Where were you taken after that?
A. After they took me out from the rock, they put a handkerchief around the arm to stop the blood.
Q. Whereabouts?
A. There. (Witness points to about three inches below the arm pit.) This is the place where the arm was amputated.
Q. Describe just how your arm was at the point three or four inches below the arm pit?
A. All the flesh there was smashed and torn down.
Q. How about the bone?
A. The bone was all right, but all the arm was open, all the flesh was open. The bone was all right.
Q. The bone was not broken?
A. No, it was not.
Q. Then where were you taken?
A. They placed me in the box and lifted me up.
Q. They placed you in a box?
19 A. Yes, in a box and lifted me up.
Q. Was this one of the boxes in which they took the rubbish upon this table?
A. Yes.
Q. And they took you up where?
A. They took me over near the office.
Q. Over near the office?
A. Yes.
Q. Is the office on the slate quarry property?
A. Yes.
Q. What happened there?
A. They wanted me taken inside the office, and after that they left me outside.
Q. Afterward they left you on the outside?
A. Yes.
Q. Why did they leave you on the outside?
A. I don't know. Probably because the office would get dirty with the blood.
Q. Where were you taken then?
A. The doctor came over, and they took me home.
Q. What doctor?
A. Dr. McCormick.
Q. Did he take you to your home?
A. To the home of my brother.
Q. To the home of your brother?
A. Yes.
Q. What happened there?
A. He sewed my arm.

Q. He sewed the arm?
A. Yes.
Q. Did that cause any pain?
A. Sure I feel pain.
Q. You felt pain?
A. Yes.
Q. Very much?
A. It certainly was great pain.
Q. Was it painful at the time of the accident?
A. It was a pain that I could not forbear. It was about
20 the same when the accident happened as when the stitches were put on my arm.
Q. What happened after the stitches were put in your arm?
A. Then they left me on the bed.
Q. How long?
A. About six days.
Q. About six days?
A. Yes.
Q. What happened during that time?
A. The doctor thought that he was able to save my arm, and he was coming to treat me, and the pain was every day worse.
Q. What happened then to your arm?
A. They took me over to the hospital. They told me that it was necessary to amputate the arm.
Q. They told you that at the hospital?
A. Yes.
Q. How was the arm as regards color before they took you over?
A. It was all black, and it was big.
Q. And then you say the doctor said he would have to take off the arm?
A. They told me that it was necessary to amputate, otherwise I was going to die.
Q. Did they take it off?
A. They told me they would cut the arm one day or two afterward, they will wait for my brother to come over.
Q. Did they take it off when your brother came over, then?
A. Yes, they did.
Q. Stand up and show the jury where it was taken off.
A. Right here (indicating).
Q. How much did you earn per day while you were working? How much?
A. $1.80 a day.
21 Q. Did you earn that during the entire time that you worked for the Albion Vein Slate Company?
A. Yes.
Q. What was the condition of your health before the accident and while you were employed?
A. It was good. I was working every day making $1.80.
Q. You were working every day making $1.80?
A. Yes.
Q. Did you use alcohol?
A. No, I never drink alcohol.
Q. And you worked every day?

A. Yes.
Q. Coming back to this No. 4 in the quarry hole, did Humphrey Davis give you orders there at different times to work?
A. Yes. I got to do it. It was my duty.
Q. It was your duty?
A. I had to obey.
Q. You had to obey?
A. I had to obey him.
Q. Humphrey Davis?
A. Humphrey Davis, yes.
Q. And did you obey the orders and directions of Humphrey Davis?
A. Yes, also the others.
Q. And did others also obey orders of Humphrey Davis, the rubbish hands?
A. Yes, they were obeying when they were working under him, as myself.
Q. When they were working under him as yourself doing what?
A. Possibly one week or two, one week or two.
Q. While they were doing what in the quarry? Working in the rubbish, or what?
A. To do all kind of work, to place this piece of iron, as I said before.
Q. Did you see him at that time giving orders to other workmen, too?
22 A. Yes, those that are working under him.
Q. And he was the only one who gave orders, then, on this particular day of the injury?
A. Yes.
Q. What work did you do after the accident, or after the injury?
A. Nothing. I am unable to work.
Q. Are you doing anything now?
A. No; I cannot.
Q. Do you have any education? Do you read and write?
A. When I had my arm on I could write and also read, but now I am unable to read.
Q. You have not been able to read since that time?
A. No.
Q. Do you write? Can you write?
A. I was able to read and write before the accident, but after the accident I am unable to write and even unable to read.
Q. How do you explain your inability to read or write?
A. I cannot write with the left hand.
Q. How about your inability to read?
A. I read only Italian.
Q. Do you suffer any or have you suffered any since the time of the accident in the stump of the right arm?
A. Even now I feel pain, and piece of bone was removed this year.
Q. Even now you feel pain?
A. Yes.
Q. And a piece of bone was removed this year?
A. Yes.
Q. Where was that removed?

A. In the arm.
Q. By whom?
A. Dr. McCormick.
Q. Of Pen Argyl?
A. Yes.

23 Cross-examination.

By Mr. Prichard:

Q. Part of your work as rubbish hand was putting these wedges or stiles under the stone in order that a chain could be put round them, was it not?
A. My work is to put the wedge under the rock.
Q. You had been doing that ever since you had been at the quarry, had you not?
A. Yes.
Q. Is this wedge that I show you the kind of wedge that you used? (Wedge produced and shown witness.)
A. I cannot say if it is the same one that I was using. They are all about the same.
Q. I am not asking you whether it is the same one. But it is like it? I do not know whether it is the same one myself.
A. About the same size.
Q. Did you tell Mr. Humphrey Davis that you were afraid to put that under?
A. Yes, after I put it a little bit inside I got scared and I told him, and the stone was very large.
Q. How far under the stone was the wedge when you told him you were afraid?
A. It was probably all under, but my hand was still outside the stone.
Q. Why were you afraid?
A. I saw that stone was a large one, and I was afraid to put my arm under.
Q. What were you afraid of?
A. I was afraid to put the piece of iron under.
Q. What were you afraid would happen?
A. The rock was like to fall on my arm.
Q. Did you tell Humphrey Davis you wanted to go after something to shove it under?
A. Yes, I told him, and he told me, "Go ahead, put under the stile, put under the stile".
Q. Just give the words that you used, as nearly as you can recollect them.
24 A. "Get him something to put in the stile."
Q. Please repeat, as near as possible, just what you said to Humphrey Davis. Use the words as nearly as you can recollect them.
A. That is all Humphrey Davis has said. "Go ahead, go ahead".

By the Court:

Q. Mr. Prichard is asking you now what you said to Humphrey Davis, your exact words.

A. Get something for to put in the stile, on the block.

By Mr. Prichard:

Q. What had you usually used before to put the wedge under?
A. I was using sometimes a hook, and also the shovel.
Q. What was the first?
A. A hook and a shovel.
Q. Sometimes a shovel?
A. A shovel.
Q. The hook is a long pole, is it not, with a hook on the end?
A. They are different sizes. Some is as long as a shovel.
Q. You used the handle of a shovel, didn't you?
A. Yes.
Q. Why did you use those things, then, instead of your hand?
A. He told me to go put in the stile, in the block.
Q. On the other occasions, the previous occasions, why did you use the shovel and the pole, instead of your hand?
A. Every time that there was a larger stone.
Q. Why did you use the shovel instead of your hand on these previous occasions for the large stones?
A. Because the stone was very wide, and it is necessary to put an arm under a little ways.
Q. Why did you use the shovel and the pole instead of
25 putting your arm under on these previous occasions?
A. Because when the rock is wide, and you have to go under with the arm, then you use a shovel and the pole, but when it is small, only a foot or two, then you put under with the hand.
Q. Then on this particular occasion, why were you afraid to use your arm? The wedge was not very far in, was it?
A. I was afraid, because if I lose my arm, then I got no more.
Q. Had you put your arm in on the previous occasions?
A. When it was a small rock I put my hand.
Q. When it was a large rock did you put your hand in before?
A. They ordered me to use something, and I was always using it. They ordered me to use something, and I was always using it.
Q. You were always to use it, and they told you, didn't they, not to put your arm in on these previous occasions?
A. Yes, and I was doing what they told me to do.
Q. Did they tell you why you must not put your arm in?
A. If the rock was a large one, I was told to get something.
Q. They told you it was dangerous to put your arm in, didn't they?
A. Yes, sure.
Q. Do you recollect that on one occasion Mr. Hooper found you putting your arm under the rock, and he grabbed you and pulled you out, and told you it was dangerous?
A. No. Probably he was joking, and he took me by the hair, and he was taking the tobacco from my pocket, just for fun.
Q. You remember his taking you by the hair, don't you?
26 A. Yes, just joking.
Q. And you had your arm under the stone at that time, had you not?
A. No.

Q. You did not have your arm under the stone?
A. No.
Q. After the accident, did not the superintendent of the Albion Vein Quarry Company offer you employment, and didn't you refuse? After the accident, did not the superintendent of the Albion Vein Slate Company offer you employment, and didn't you refuse? He offered to employ you, offered to hire you, give you a job?
A. Yes, they did, but how can I do it? They did, but how could I do it? How could I do it, the job?
Q. You refused, didn't you?
A. I am unable to work. That is why I refused.
Q. Didn't he offer to give you a job that you could perform?
A. He told me that they are willing to give a job to me. I don't know what kind of a job they will give me.
Q. Didn't you ask what kind of a job they will give you?
A. No, I did not.

Redirect examination.

By Mr. Paff:

Q. Was there anything said about signing a paper at the time that job was offered?
A. Yes, they told me I had to sign something.
Q. And what did you say about that?
A. He offered me $200, and after that he offered me $250 and the job.
Q. If you did what?
A. He told me he was willing to give me a job and $250, but I don't know what kind of a job.
Q. You were asked on cross-examination why you put this
27 under. What was the purport of putting it under the rock?
A. To split the rocks so they could put the chain under and lift it up.
Q. This iron hook that they were talking about, was that iron hook not used to pull the chain through after the rock was split apart?
A. Yes, and also to put the wedge under.
Q. Also to put the wedge under?
A. Yes.

Recross-examination.

By Mr. Prichard:

Q. I would like to ask you one other question. Do you mean to say that at this interview, where the superintendent offered you employment, that he made any condition whatever as to signing any paper?
A. Sure.
Q. All right.
A. He had the paper in his pocket, he wanted to pull it out, to be signed.

Mr. Paff: If the Court please, my colleague and I come from

Easton. We are residents of Easton. We assumed when we got here we could find the mortality tables in the Court House, and we have been trying to get them since a short time after adjournment, and we would like to have permission to put them in at the end of the case.

Mr. Prichard: I have no objection to that, sir.

Mr. Paff: With that we rest.

Plaintiff rests.

Counsel for defendant moved for a non-suit.

At 3 o'clock p. m. Court adjourned until Tuesday, October 10, 1916, at 10 o'clock a. m.

28 PHILADELPHIA, PA., Tuesday, October 10, 1916—10 a. m.

Present: Parties as before noted.

Motion for non-suit overruled.

Mr. Smith: I desire to offer in evidence the present mortality tables, showing the expectancy of life at twenty-three to be 39.31 years, and at twenty-one, 40.75 years.

The Court: Which is it?

Mr. Smith: At twenty-one, it is 40.75, and at twenty-three it is 39.31. His testimony was that he is now twenty-three years of age, and at the time of the accident he would be twenty-one.

Plaintiff closes.

Defendant's Evidence.

ALEXANDER MCKENNA, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Where do you reside?

A. In Pen Argyl, Pennsylvania.

Q. You are the Superintendent of the Albion Vein Slate Company, the defendant in this case?

A. I was, yes.

Q. You are not now in their employ?

A. No, sir.

Q. During what times were you in their employ?

A. I have been in their employ from 1912 up until the present year, in June.

Q. From 1912 down to 1916—June, 1916?

29 A. Yes, sir.

Q. You were the Superintendent in the quarry, therefore, at the time of this accident?

A. Yes, sir.

Q. You have been how long a quarryman?

A. How long?

Q. Yes.

A. I went in the slate business when I was aged 14.

Q. Will you tell the Court and Jury what was the organization of this quarry? Who was at the head of it, I mean the work. You were the superintendent?

A. Yes, sir.

Q. Then, who were under you?

A. There was nobody under me in managing the quarry.

Q. And how many gangs of men were there?

A. I had five cables around me,—ropes, in other words, and with different gangs to each rope. As a rule, four men, four quarrymen, to each rope, and supposed to be two rubbish hands, or laboring hands, in other words, but at this time only one to each rope, owing to the scarcity of labor.

Q. One rubbish hand?

A. Yes, sir.

Q. How many other men besides the laborer were at that rope?

A. Four men as a rule. They vary sometimes, but three to four, but four in this case.

Q. What were the duties of the various men in the gang?

A. The duties of the quarrymen were to quarry out the blocks for the manufacturing of slate.

Q. The duty of the laborer or rubbish man, as you call him, was what?

A. To obey the call of these men that were quarrying out the slate, whatever they demanded of them to do.

Q. Won't you tell the jury in your own way,—or, first, let me ask you, was it part of the duty of this rubbish man to put the wedges under the stone?

A. Yes, sir.

Q. Why were those wedges put under the stone?

A. In order to get the chain round to hoist the block up.

Q. Will you just tell the Court and jury how these slates were quarried out?

A. Well, these slates are quarried out, if none of you have ever seen a slate quarry, it is an open hole from the surface down, it is quarried down, and we go down so far before we come in contact with good slate, material for making roofing slate, or mill stock, or for blackboards, then when we come to that place where we can make either roofing or mill stock or blackboards, we are more careful about the handling of the slate, it is handled in a more mechanical way, blasted very light, in order to get it out solid, and we use very small steels, about the size of my finger, probably a little bigger, in order to get in what we call a light blast, that is, a fine blast, in order to get it out solid. These quarrymen are supposed to handle this. When we come to that place we use the steam drills, or the jack hammers would be used, with the adze for that purpose, and we cut into a drift, the open drift on the side, we cut it in there eight to ten feet, and it may be thirty to thirty-five to forty feet long, as the case may be. We go in by joints. Then, those drifts are carried in from one side of the quarry to the other. For instance, in this case there was No. 5 cable to carry those drifts so far, then No. 4 would take hold of them and carry them so far over to No. 3, until we reach No. 1. Each gang or

each rope was supposed to carry a piece that far, then the other gang would follow on, and in this case the party that was working on this No. 4 rope, there was a blast made, and when the blast was made they started to split the stone up. The stone is split the same as
31 you put a chisel in under this book here (illustrating with book), and then raise it up with a hammer and the chisels, where the wedge is put in, then they use a crow-bar in order to ply it open, and they shove in the wedge, a small wedge first, and then when they get the small wedges as far as is necessary to put them in, they use these big wedges, or what we call the stiler irons.

Q. This model that has been produced here is the kind?

A. Yes. If you will pardon me for using that, that is put under the block, and it is supposed to go in so that the chain will go around the end here (indicating), in order to raise this block up. At times we use two chains, one small chain, so as to raise it up, in order to use the big chain, if it is a heavy piece. If not, the small chain will carry it to the surface. But as a rule we use two chains for safety. The small chain is used to raise it up, then the big chain is put around it in order to carry it up to the surface, to get to manufacturing of the slate. That is practically the way the slate is handled.

Q. How is the big wedge that you hold in your hand pushed under the stone?

A. It is pushed in as a rule that far (indicating). Then it is at this end (indicating). They are supposed then to take a stick or a hammer or an iron and push this in. They are not supposed to use their hand, at no time under any conditions are they supposed to use their hand in order to push this in. I always made it a point in my life to instruct the labor hands and all men to be careful, in using such things, in handling, not to use their hands.

Q. You were at the quarry at the time of the accident, were you not?

A. I was; yes, sir.

Q. Where were you?

A. I was on the top at the time of the accident.

Q. Up on the bank?

A. Yes, sir.

Q. Therefore, you did not see the accident actually happen?

32 A. No, sir; I did not.

Q. Mr. Fillippon, the plaintiff, has said that you offered him employment after the accident, but you accompanied it with the condition that he would sign some paper. Is that so?

A. Positively not.

Q. Just state what did occur?

A. I was seeing this young man pretty near daily, being in the same town, and I always had sympathy for him, because he was a good little worker, and I thought a lot of him while he was working, he was active, and always energetic, willing to do whatever I would ask him to do, and I had sympathy for him, and going around doing nothing, I offered him employment that I thought he could do, that I knew men of similar character had been doing, and I was told that he was suffering in a way that he could not do it, but under no conditions did I ask him to sign a paper or anything else.

Q. What did he say when you offered him employment?

A. In fact, the company did not know that I made the offer to him, none of the company was aware of the fact that I made an offer to him of a job.

Q. What did he say when you made the offer?

A. He said he was not able to do it.

By the Court:

Q. He said what?

A. He said he was not able to do it.

By Mr. Prichard:

Q. And did he ever come to apply for employment after that time?

A. Sir?

Q. Did he ever apply to you for employment after that time?

A. No, sir; he did not.

(No cross-examination.)

33 HUMPHREY DAVIS, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Where do you live?

A. Wind Gap.

Q. Are you in the employ of the Albion Vein Slate Company?

A. Yes, sir.

Q. You are in their employ now?

A. Not now, no, sir. I am in Easton now.

Q. Where are you employed now?

A. Easton.

Q. You were in the employ of the Albion Vein Slate Company at the time of the accident, were you?

A. Yes, sir.

Q. What was your position there?

A. Taking off the blocks. Block man, they call it.

Q. Mr. Fillipon has said that you and your son were lifting up the rock with crow-bars, and that you told him to put in a wedge, and then he told you that he was afraid, that he wanted to get something, that he was afraid to push it in without something to push it with, and you told him to go ahead. Please state what did occur?

A. I told him to wedge this block for me. He took a little wedge first, until he had it high enough to put the big wedge in, and after I told him to put the big wedge in, and he put it in.

Q. Did he tell you he was afraid to do it?

A. I cannot recall that now.

Q. Did he ask you to get something to push the wedge under?

A. No, sir; there was nothing there.

Q. Did he ask to go to get something, or ask you to go to get something?

A. No, sir.

Q. He said he told you he was afraid to do it unless you would get something to push the wedge under, that you would not let him do it.

34 A. I don't remember if he told me he was afraid. I cannot remember that, if he told me he was afraid or not. I don't remember that.

Q. Just state in your own way, Mr. Davis, to the Court and the jury just how this happened, what you saw of the accident, how the accident happened, and what you were doing, and what was said?

A. Well, we had a block that measured about six or seven feet long to from four or five feet wide, and somewhere in the neighborhood of six inches thick, six or seven inches thick, something like that, and we wanted to raise that block up to put a chain right around the middle of it, and the rock was pitched about that much (illustrating with book), and then we were taking a crow-bar and bracing it up, we did not lift it, we only braced it up, and he pushed a small wedge in first, so that it would be high enough to start the big wedge, then he puts the big wedge in, right under the middle of the block, so that the two sides would be up level, so that we could put the chain around it, and then when he did that, there was a catch on the block—we did not know that, and then as soon as we lifted it up, then the catch came, and the block fell down and it rolled the stile around,—it was not a stile, but it was exactly the same,—it rolled down on his arm, and that is all I could say about it.

By a Juror:

Q. What do you mean by a catch? Do you mean there was a hump on the rock?

A. The catch had been inside there, you know, and we did not know about this catch, until when we lifted it up. Something like a split, in the rock, you know.

By Mr. Prichard:

Q. What do you mean by a catch? I do not quite understand?

By the Juror:

Q. A break in the stone?

35 A. A step in the split, something like when we split it, you know.

The Court: The split was not straight. There was a step in it.

Mr. Prichard: I see.

Cross-examination.

By Mr. Smith:

Q. Mr. Davis, you handled rock before that had catches in, hadn't you?

A. Sir?

Q. This frequently happened, that there were catches in rocks?

A. Oh, yes.

Q. And you and your son were there at the rock when the stile was put in this wedge?

A. Yes, sir.

Q. You were right there?

A. Yes, sir.
Q. And you used the crow-bars?
A. Yes, sir.
Q. To pry up the rock far enough so that the wedge could go in?
A. Yes, sir.
Q. And you told him to put the wedge in?
A. Yes, sir.
Q. And you saw that he was using his arm, did you not? You saw that he was pushing it in?
A. Yes, sir.
Q. And you had called him over from the rubbish, from his loading the rubbish? He was loading the rubbish, was he not?
A. Yes, sir.
Q. And you called him over, when you were ready to put this wedge under, because you needed his assistance. Isn't that so?
A. Yes, sir.
36 Q. And then you called him over, and there was no stick there to push it in, was there?
A. I did not notice of any. There was no stick there in purpose to put it in.
Q. "There was no stick in purpose to put it in." Do you know that they ordinarily use a stick to push it in?
A. Sometimes they will, especially if you go too far when you put your hand in, sometimes you take a shovel handle.
Q. You say that you saw him putting his arm in?
A. Yes.
Q. Did you tell him to take it out?
A. No, sir.
Q. You did not tell him to take it out?
A. No, sir.
Q. What was the size of the rock? I believe you described it, about six feet long and five or six feet wide. Is that so?
A. Four or five feet wide.
Q. Six or seven inches thick?
A. Yes.
Q. And it was very heavy? This was rather a large block, was it not?
A. Oh, no; that was not a very large block. It weighed about ten or eleven hundred. Something like that.
Q. Ten or eleven hundred?
A. Yes, sir.
Q. What was the character of the top of the rock? Was it square, or was it long, or was it large, or was it irregular? Did it have a bend to it?
A. Yes. One side was longer than the other.
Q. One side was longer than the other?
A. There was a corner off one side of it.
Q. And you did not have the chain around yet when this happened?
A. No, sir.

37 By a Juror:

Q. Do you only use a stick to shove it in when you cannot reach it with your arm?

By Mr. Smith:

Q. One of the jurymen asks whether you only use a stick to shove it in when you cannot shove it in with your arm, and I will ask you this additional question now, was the stick used for safety?

A. That stick was used,—sometimes they get in their hand, and they will push it, to start it, and then they take a stick, if they get it handy.

Q. Was it always used for safety,—the stick?

A. No, sir.

Q. Not for safety?

A. No, sir.

Q. Was there any danger at all in using the arm?

A. Not always.

Q. But sometimes?

A. Sometimes.

Q. When was there danger, and when was there no danger in using the arm?

A. We could not say that, you know.

Q. That you could not say?

A. No, sir.

Q. What was generally used there? The stick, or just the hand?

A. Well, some used the stick, but not often, you know.

Q. Not often?

A. Most of the time they used the hand.

By a Juror:

Q. What degree was the pitch at the bottom where this rock laid on, and how far was the drop down over this pitch?

By Mr. Smith:

Q. Do you understand the juror's question?

A. Yes, sir. The pitch was about that much in the rock (indicating).

38 By the Juror:

Q. About 10 degrees?

A. I could not tell you that. I never measured it. I just judge.

By Mr. Smith:

Q. How far was it dropped?

A. There was no drop at all.

Q. There was no drop at all?

A. No, sir; no drop at all.

By the Juror:

Q. It dropped back on the pitch after it was raised up?

A. Yes. There was no drop at all. It was up—this block was right on the bottom of the quarry. There was no drop at all. Only this block rolled down, and the stile rolled down on the block, and then the block slid down and caught his arm.

By Mr. Smith:

Q. Do I understand you to say that the stile rolled down with the block?
A. Yes, sir.
Q. So that the stile turned over?
A. Yes, sir.
Q. That is, the stile was put in upright?
A. Yes.
Q. As we had it here?
A. Yes, sir.
Q. So that we understand this, this stile was put in like this (illustrating), and then when the rock started to pitch——
A. Bring it up here. It was not so heavy as this one.
Q. It was not so heavy?
A. No, sir. They generally get a pitch like that to hold it in like that (illustrating). This would be the top and this would be the bottom. Then, after the block slid down, it rolled like this on him, you know.

39 By a Juror:

Q. There would be an angle to this stone? You put it in from the top?
A. No, from the side.
Q. How far was it from here (indicating), where this piece was broken off, down here to the solid piece? How far was the slit down in there (indicating)?
A. It was right on the solid piece, right on the bottom of the quarry. Then it dropped. Only we pitched it in like that, you know (illustrating). Then when it slid down, this rolled here, and caught his arm.

By Mr. Smith:

Q. Did they have a special stick or shovel at all?
A. No, sir.
Q. Do they have in other quarries a special stick or shovels?
A. Where I worked there was a stick there. You take the handle so (illustrating). That slid over. It slid by. This is a little too heavy to push here. It slides all the time.
Q. What kind of a stick? Did that stick you speak of have a prong in there, so that you would catch the stile at the back, and shove it just as you wanted it?
A. Yes, sir; and I saw a stick like that in quarries, too.
Q. You saw a stick like that, too?
A. Yes, sir.
Q. Did this quarry have a stick like that?
A. I did not notice none there.

Q. In how many quarries did you use this stick?
A. In one quarry.
Q. In one quarry?
A. Yes, sir.
Q. What did you see in the other quarries?
A. Just the same. I did not work only in three quarries altogether.
Q. What did they have in those three quarries?
40 A. In one quarry they had sticks that I worked in, and in the others it was the same as this quarry.

Mr. Prichard: The same as in this quarry.

By Mr. Smith:

Q. Do you mean the same as those in this quarry?
A. Yes, just the same as in this quarry.
Q. In this quarry you used the shovel at times?
A. Yes, sir.
Q. And did you ever use the hook?
A. To push it?
Q. Yes.
A. They do sometimes. They have got a hook there to pull the chains?
Q. That is the hook I mean. The hook to pull the chains, to pull them through. Was that ever used to push it in?
A. Yes, sir; you might as well when you could get one. They ain't got them with every rope there.
Q. It was not there at every rope.
A. No.
Q. Did they have a hook at this place that day?
A. I don't remember that I saw it.
Q. You don't remember that you saw it?
A. No, sir.

Redirect examination.

By Mr. Prichard:

Q. Mr. Davis, you and your son were each using crow-bars?
A. I don't understand that. I don't hear very good.
Q. At the time of the accident you were lifting with a crow-bar?
A. Yes.
Q. And your son was lifting with a crow-bar?
A. Yes.
Q. Was this wedge between the two crow-bars?
41 A. No, it was not between the two. I was in the end of the block and my son was on the corner, and he was to that upper side with his crow-bar.
Q. That is, your son was between you and Fillippon?
A. Yes, sir.
Q. Had this method of wedging blocks been used all the time that you were there in this quarry?
A. Yes, sir.

Q. How long had you been there?
A. About three years.
Q. And you were there, therefore, all the time that the plaintiff was there—you were there all the time that Mr. Fillippon was there?
A. Yes, sir.
Q. And the method of wedging blocks was the same during all the time that Mr. Fillippon was there?
A. Yes, sir.

WILLIAM DAVIS, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Are you in the employ of the Albion Vein Slate Company now?
A. No, sir.
Q. You were at the time of the accident, were you not?
A. Yes, sir.
Q. You were helping your father there?
A. Yes, sir.
Q. You were one of the quarrymen?
A. Yes, sir.
Q. Just tell the Court and the jury in your own way just what you saw of this accident and how it occurred.
A. Well, I was working as a helper. I was helping my father at this time that the accident happened. I was working there,
42 helping my father. I was working on a piece there with my father. A piece of rock was there. So we had to raise the split in the stone. We started it up, in order to get the chain around, and we had crow-bars to start it up. We had started it first, used a wedge to put under that bar, in order to raise it up. Then after you get this here started in, about so much (indicating with hook), we would put our hammers down, under our bars. After we got this thing up, we had to get it far enough, so that we could get the chain around. So after we got it in, he (plaintiff) pushed it in with his hand, and the block started to slide off, and it ran on his arm.
Q. How near were you to your father?
A. The block was only about six feet long.
Q. And were you next to your father, or was Fillippon between you and your father?
A. I don't quite remember whether I was next to him, or whether he was in the middle, between us.
Q. Did you hear Fillippon say that he was afraid?
A. No, I did not hear that.
Q. Did you hear him ask your father to get something to push the wedge in?
A. No.
Q. Or ask your father to allow him to get something to push the wedge in?
A. Not that I heard. I did not hear it. I did not hear it.
Q. And you were certainly within four or five feet of your father? You were within four or five feet of your father, were you not?
A. I must have been. I was right there to one side of the block. We could not be far apart.

Cross-examination.

By Mr. Smith:

Q. Mr. Davis, weren't you on the same side of the block with Mr. Fillippon?

A. Oh, yes.

43 Q. I understand the order, then, was this. Fillippon was at the point near where the block was raised on the bed or surface?

A. It was right on the bed.

Q. Exactly, but he was at that end, and was pushing it in, he was putting the stile in at that point. Is that correct?

A. Yes.

Q. Then, who stood next to him?

A. I don't remember whether it was father or I. I believe I stood next to him.

Q. You believe you stood next to him?

A. Yes.

Q. And then next to him was your father?

A. Yes.

Q. All on the same side?

A. We were all on the same side of the block.

Q. And how far were you away from Fillippon?

A. Oh, I don't know. We were right close together.

Q. Did you see him put his hand in?

A. Yes, sir.

Q. And did you see him when he started this stile—that is, when he started to put the wedge in?

A. Yes.

Q. And did you see him put it all the way in?

A. Yes, sir.

Q. Did you tell him that he should not do that?

A. No, I did not tell him nothing.

Q. You told him nothing?

A. I did not say anything.

Q. You did not say anything?

A. No, sir.

Q. And did you *see* your father say anything to him, that he should not put his hand in there?

A. No, sir; I did not hear him say anything.

By the Court:

Q. Did you hear him say that he should push it in?

44 A. He called him over to push it in.

By Mr. Smith:

Q. He called him over to push it in.

By the Court:

Q. He called him over there for that purpose, but what did you hear him say, if anything, at the time he was putting the wedge in?

A. He did not say anything to him. He had to put it in far enough so that it would raise up high enough to get the chain around.
Q. Did you hear him tell him how he should put it in, whether to use a stick, or his hand?
A. No, sir.

By Mr. Smith:

Q. Did you hear your father tell him to push it in?
A. I heard him say he should put the stile in.
Q. He should put the stile in?
A. Yes, sir.

By the Court:

Q. That is the time he started to put it in?
A. Yes, sir.
Q. While he was putting it in, did he say anything to him?
A. I don't remember whether he said anything to him at that time or not. After he had it started I don't know whether he said anything to him after he had the stiler started.

HARRY HOOPER, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Where do you reside?
A. Pen Argyl.
Q. Are you in the employ of the Albion Vein Slate Company?
45 A. Not today.
Q. Were you in the employ of the company?
A. At that time, yes, sir.
Q. At the time of the accident?
A. Yes, sir.
Q. What was your position?
A. Taking out blocks.
Q. What, if anything, do you know about the warning to this plaintiff Fillippon or other employees of the company as to the danger of putting an arm in under the stone?
A. What is it you say? I do not hear so very clearly.
Q. Did you ever warn Fillippon himself about the danger of putting his arm under the rock?
A. Yes, sir.
Q. When?
A. When he worked on the rope where I did.
Q. How long before the accident was that?
A. I could not positively say to the day or two, but maybe a week or a couple of weeks before that.
Q. Won't you tell the Court and Jury just what you said to him and just what occurred?
A. Yes, sir. When he worked with me, I used to tell him to take a stick or a shovel handle or a piece of iron that was on the hook, to

shove it in. Of course, you always have to take your hand first to get it started, but after you get it so far, then you take this piece of wood or hook to shove it under, to keep from catching your hand. Of course, the boy was always willing and quick about his work and he wanted to do it quick, you know, and I used to make him take the hammer or the shovel, or something, to shove it in, for fear this thing would catch him, because I have seen this thing done before in my experience in working in the quarries and he would say, "Me no afraid." He would say he was not afraid, you know.

Q. Do you remember the occasion that you pulled him back?

46 A. Yes, sir.

Q. Just tell the jury what occurred then?

A. Well, there was a rock pitched away from the bank. Of course, you have got to go under the bottom, to raise it. It is like a pitch there, and in order to get the block up, you have got to raise under there, put this iron under, and he was in front of this stone, with the rock pitching, and I told him he should get up, and I took him by the hair of the head and I said, "You get up out of there or you will get caught one day." He said, "Me no afraid." I said, "When you get caught it will be too late in the day. You had better be careful." Of course, he got up.

Cross-examination.

By Mr. Smith:

Q. What was your position at the quarry?

A. Taking out blocks.

Q. Did you have the same position at this quarry which Mr. Humphrey Davis had?

A. Yes, sir.

Q. Just exactly. And you told him that he should not put his hand in there, didn't you?

A. Yes, sir.

Q. In fact, you say that you caught him by the hair one day and pulled him back and said that he ought to use a stick or something?

A. Yes, sir.

Q. And did you know that this was dangerous?

A. Yes, sir.

Q. What is that?

A. Yes, sir.

Q. And did you discuss this danger with other block men at any time? Did you talk about this danger with Humphrey Davis at any time?

A. I did not.

Q. You did not?

A. No, sir.

47 Q. But this was so dangerous, was it not, that everybody knew about it, that this was dangerous to put a stile in with the hand?

A. Yes. It is done every day. You have got to take it up with your hand, to put it in.

Q. To start it?
A. Yes, sir.
Q. And when you get it under the block, everybody knew, it was a matter of common knowledge that that was a dangerous piece of business?
A. Of course, where the rock pitches. A man does not always think so far, you know.
Q. You mean to say that it was not necessarily dangerous, but it might be dangerous?
A. Well, there is such a thing as that rolling over, you know.
Q. If it does not roll over, it is not dangerous at all?
A. It is all right if the block does not go over and does not slip.
Q. If it rests stationary, if it remains stable, then there is no danger?
A. It is all right then.
Q. But it also differs with the size of the block, does it not? If a block is large, it is much more dangerous that if it is a small block?
A. Yes, sir. It is apt to come down, maybe, on the pitch of the rock.
Q. But the danger of injury is not as great with a small block as it is with a very large block. Isn't that self-evident?
A. That is so, I believe, yes, sir. I should judge so.
Q. That is so?
A. Yes.
Q. You did not know whether there was any stick or hook there at that place, that is, at Humphrey Davis' place, that day, to push this in, did you?
48 A. Well, there would be a hammer or a shovel which he could have done it with.
Q. But whether there was a hammer or a shovel there——
A. He could have done it with that, I suppose.
Q. He could have done it with that?
A. Yes.
Q. Is there any increased danger when a block is on an incline than when it lies level?
A. Well, I should judge it is more safe when it is level than when the rock is pitched, because if you get under the stone to raise it the bar or something might come toward you, down over the hole.
Q. What would your answer be to my question, then? Is it more dangerous if there is an incline?
A. Yes, I should judge there was.

Redirect examination.

By Mr. Prichard:

Q. Mr. Smith asked you about the method. Everybody in the quarry knew, did they not, that if your hand was under the block, and anything happened, that your hand would get crushed?
A. That was just the thing that would happen unless it was big enough to keep from getting your arm under.
Q. Unless the wedge was big enough so that it would not come down far enough to crush your hand?

A. Yes.

Q. And if you did not put your hand under it could not get crushed?

A. No, sir; not very well.

DAVID STODDARD, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Where do you live?

A. Bangor, Pennsylvania.

49 Q. What is your connection with the Albion Vein Slate Company?

A. I am its president.

Q. You are the president of the company?

A. Yes, sir.

Q. Can you state in a general way the method of taking out this slate?

A. Yes, sir.

Q. Will you do so?

A. It has been pretty generally described. When a blast is made they want to raise a block, to put a chain in, one or two or more, as the case may be. They will take a stile like this, and put it in, when they get the block up just a little ways, until they get the stile in. Then they push it in as they raise it up, pushing the stile in. They push it in. There is no danger to the hand until the stile is placed in under the block. Then it is general knowledge that a man who puts his hand under the block, either in the quarry, or in the mill work, is in danger.

Q. What methods do they use to push it in when it gets up so far that they cannot push it without putting the hand in?

A. The common thing is to use the hook that is used to pull the chain in after the stiler gets in. Sometimes a shovel is used. Sometimes a bar is used. Sometimes a piece of wood. A piece of wood is used. They push it under the block, because it is general knowledge that when a man gets his hand under a block, under any circumstances, that it is unsafe. That is why we have the hook to pull the chain. The hook is pushed through from one side, I mean the hook on the chain is pushed from one side, along as far as possible, and then another hook is used to reach in and get it, so as not to put your hand in under the block. It is very dangerous, because if they happen to have a joint running through here, and a man has his hand under here, there might be a joint running straight through here, and it might crush his hand.

50 Q. From your knowledge and experience state whether or not the hands are used for that work?

A. No, sir; no man would ever think of directing a quarryman to put his hand under the block under those circumstances, or in any other way.

Q. How long have you been the president of this company?

A. I was going to say from its inception, but I would say eight years I have been the president of this particular company.

Q. Has this method been pursued all the time you have been there?

A. Oh, yes, sir; it has been pursued for thirty years.

Q. Have you ever known of a man getting his hand crushed?

A. In my thirty years' experience, I have never known of a man getting crushed by the use of a stiler.

Q. Have you examined your records to see what the average earning of Fillippon was?

A. Yes, I have the records here to show what he earned last year. The average would be—I could not tell you offhand—but he earned $435 last year.

By the Court:

Q. That is, previous to his injury?

A. Yes, sir.

A Juror: Do they have orders that no man is allowed to put his hand in?

By Mr. Prichard:

Q. Do you have orders that no man is allowed to put his hand under the block?

A. Yes, sir; those are general orders.

By a Juror:

Q. Did you ever discharge a man for doing that?

A. I cannot say that I have, but I have threatened them I presume one hundred times.

51 Q. Did you ever discharge a man for refusing to do it?

A. No, sir.

By another Juror:

Q. How did it come that Mr. Davis testifies they did not have this hook at this particular gang?

A. The rope passes over a certain amount of rock from, we will say, the north to the south of the quarry. That rope will go along and pick up rock in a certain space. Then there are about four hole men in that space, along. Then the rope next to that will pick it up. Maybe that is twenty-five to fifty feet. While they all have these hooks, at that time it might have been ten or fifteen feet away from him, when he did this, but it would be there. They are all over. It could not be other than there. It would belong there just as much as the stiler would.

By another Juror:

Q. Do the men in charge of the lifting of the slate get paid by contract or day's wages?

A. Well, they are paid by day's wages, but sometimes we guarantee that they shall reach a certain amount.

Q. A certain amount of production has got to be done?

A. No, not those men. We guarantee that their wages shall not be less than so much.

Cross-examination.

By Mr. Smith:

Q. Was Humphrey Davis paid by the day or by the quantity that he got out?

A. He was paid—he is one of the men—this particular man that was hurt did not come under that class. This man was paid $1.80 a day.

52 By a Juror:

Q. He was a day man?

A. Yes, sir.

By Mr. Smith:

Q. Humphrey Davis is the man the juror asked about. How was Humphrey Davis paid?

A. Humphrey Davis was paid by the day, but he was guaranteed to have so much, and I think an extra 30 cents a square, or something, I guess maybe 30 cents a square might have been Humphrey Davis'. Sometimes they do it one way and sometimes they do it another.

Q. But, now, come right down to the point. Do you know or don't you know that Humphrey Davis was paid so much per day, and then in addition he was to receive a commission on what he got out?

A. Now, I would rather you would ask Mr. McKennan that question. He knows absolutely about that, and I don't exactly know about it.

Q. But I have asked you about it.

The Court: He says he does not know.

The Witness: I would not like to say positively.

By Mr. Smith:

Q. Let me refresh your recollection. Wasn't he paid thirty-three cents a square?

A. Yes, it is possible that he was. I know we have done that, but that would not take effect on the laboring men.

Q. That is all I wanted to know, whether he was not paid by the square.

Defendant closes.

Testimony closed.

53 *Charge of the Court.*

Hon. Charles B. Witmer, J., specially presiding.

GENTLEMEN OF THE JURY: The plaintiff, Donatto Fillippon, is in this case seeking to recover from the defendant, the Albion Vein Slate Company, certain damages for personal injuries which he claims to have sustained by reason of an accident occurring to him while in the employ of the defendant company on or about the 31st day of July, 1914.

The plaintiff is a citizen of Italy, although at present residing in this country, and the defendant is a corporation of the State of Pennsylvania; hence by reason of such diverse citizenship, the case has found its way into this court.

By way of preface or introduction, let me suggest that this is an important case to the parties, the plaintiff and the defendant, and it should not be decided with a view of dispensing charity. Strong appeals have been made to you by counsel regarding their clients, all of which can only have possible relevancy before a jury to induce it to come up to the full measure of its duty, and to give the case the best and highest consideration of which it is capable. Whether the parties before you, on the one hand, as appears to be the case of the plaintiff, is poor, and a foreigner, and on the other hand a corporation with some possible means, should not concern you whatever, or be held or considered to weigh for or against either one of the parties. You are sworn to try the case according to the law and the evidence, and I want to remind you that in a court of justice before a jury all persons, of whatever character or description, are equal. Therefore, you will, I know, dispose of this case according to the law and the evidence and base your verdict on nothing else. The evidence you have from the witnesses, of whose credibility you will be the judges,

54 and as to the credence or confidence to be placed on what they have said, or the extent to which they are to be trusted, you may take into consideration, and you ought to take into consideration, their interest in the ultimate result of the case, and their demeanor on the stand while testifying. The law of the case, as a guide to a just conclusion, you will receive from the court. You alone are responsible for the facts of the case as you find them to be in the light of the instructions that you receive in regard to the law. With these few preliminary admonitions and instructions, I will ask you to consider the case.

It appears that at the time of the accident the defendant company was engaged in the business of mining and quarrying slate and slate products, and in fact did operate a slate quarry near the Borough of Pen Argyl, in the County of Northampton, this State, and the plaintiff was then, and for some time prior to the accident, in the employ of such company as a rubbish hand, the duties of which consist of loading boxes preparatory to hoisting the same out of the quarry, and, furthermore, to assist as such hand in raising blocks of slate or material used in the manufacture of slate and slate products as the same was being quarried and detached from the place which it was obtained, by placing or slipping under such blocks of slate an iron

wedge of the character as here offered in evidence. Upon the particular day in question, while a piece of block of slate of considerable size was being lifted or raised from its bed so as to adjust the necessary chain or instrument by which it could be removed, as desired by those operating the quarry, the plaintiff in attempting to place or slip under it the iron wedge, while others were raising the block with bars or levers, was caught in the attempt of so doing, resulting in the injury of his right arm, necessitating the amputation of the same near the shoulder.

Regarding the character of the injury you will have no difficulty, since you have seen the plaintiff's arm and heard the testimony of the witnesses produced, which is hardly disputed.

55 The important question is as to how the accident occurred, and whether or not the defendant should be held liable for the same.

The master assumes the duty toward the servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work; and it is furthermore the duty of the master to give the servant proper instructions so as to enable him reasonably to guard and protect himself against danger while in the discharge of his duties. If the master fails in doing this, and the servant or employee is injured, and without fault of his own, the master is liable in damages. And, furthermore, whenever the master delegates to any officer, servant, agent or employee, high or low, the performance of the duty which really devolves upon the master himself, then such officer, servant, agent or employee stands in the place of the master and becomes a substitute for the master and the master is liable for his acts or negligence, if he is guilty of any.

The questions, therefore, presenting themselves to you in this particular case are first: Did the master, the defendant in this case, through one Humphreys Davis, direct and instruct the plaintiff to reach under the block of slate, about to be lifted and there to place the iron wedge in manner as testified by the plaintiff? And, second: If so, was it reasonably safe to do so under the circumstances? And, third: If not, and resulting in the injury to the plaintiff, was he free himself from contributing to the injury? Regarding the first proposition I will say to you that if you believe the testimony of the plaintiff, that Humphrey Davis had charge and supervision of the work in and about the place where the plaintiff was working, that he had authority to direct how the work was to be done, incident and pertaining to the lifting and moving of the stone from the bed of the quarry at the point in question, you would be justified in

56 finding that he was such agent, acting for and on behalf of the defendant company, whereby the defendant became bound by his acts and conduct, and if you so find, you will then determine whether or not he took every reasonable precaution to protect the plaintiff while he was engaged in and about his employment. If you find that Davis had no such authority from the company, or that he did not direct the plaintiff to do that which was not reasonably safe under the circumstances, while so engaged at his work, you need not carry your investigation any further, and find a verdict for the defendant. Regarding this matter I will ask you to consider all of the evidence before you, the character of the employment, the posi-

tion of the block of slate at and before it slipped and fell on the plaintiff's arm, and the circumstances and conditions attending the injury. If, however, on the other hand you find that Humphrey Davis was acting with authority and he did direct and instruct the plaintiff to place himself in a position where it was not reasonably safe in order to do the work in which he was engaged, having in mind the particular position of the block of slate at the time, and although the injury to the plaintiff resulted from such negligence on the part of the defendant through its agent, Davis, you must be satisfied that the plaintiff himself acted as a reasonably prudent man would under the circumstances.

I want to say to you also that when a man accepts employment he assumes also with it the ordinary risk incident to such employment, and if you find the circumstances or situation in which the plaintiff found himself at the time of the accident, or that his performance leading up to the injury was of ordinary occurrence, then you may conclude that he had assumed the risk of the accident that has befallen him, and he cannot recover; but on his part it is contended that the situation in which he found himself at the time when
the stone or slate block, properly speaking, was suspended or
57 lifted by the men, was of an extraordinary character, that
the plaintiff when about to place the iron wedge found the stone or block large, and threatening danger, as he believed, whereupon he was suddenly and hastily summoned and directed to act by the foreman, whereupon he had but little or no time to judge of his own safety, and yielding to the judgment of his superior he acted. Now, if you find the facts as contended for by the plaintiff, I will ask you to say whether he was guilty of contributory negligence under the circumstances. Could he have protected or saved himself by the use or exercise of ordinary care? If he is to blame in part, or has in any manner contributed to his injury, he is not entitled to your verdict. The rule in negligence cases is, that while the defendant is held to exercise due and reasonable care under the circumstances, the plaintiff is also held to exercise the same degree of care, and if he does not do so, he cannot recover. Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous. If the danger was imminent that faced the plaintiff, and he in the face of it did the thing that he knew, as a reasonably careful man, under the circumstances, was dangerous, he is guilty of contributory negligence and cannot recover.

With this explanation I will leave you to apply these principles to the case in hand and determine whether the plaintiff ought to recover. If you conclude that he is not entitled to your verdict, you need not proceed further with the case. If, however, after weighing all the evidence in the case, you find on all three of these propositions which I have submitted to you in favor of the plaintiff, always remembering that it is the duty of the plaintiff to satisfy you by the
weight or preponderance of the evidence upon any and all of
58 his contentions, you will then proceed to determine the
amount to which the plaintiff is entitled. And you should not infer from what I say upon this phase of the case any state of mind

of my own or any conclusion of my mind regarding this matter. It is my duty to instruct you as to the law pertaining to damages, so that you are informed if you should reach this part of the case.

If you conclude to find the defendant liable, the plaintiff is ordinarily entitled to any expenditure which he had in endeavoring to be cured, which in this case is eliminated for want of evidence on this point. He would be entitled to be compensated for the loss, if any, in earning capacity. In the first place, he would be entitled for any time already lost by reason of this injury in the value of wages he may have lost already up to this time. On this point you have the plaintiff's statement, saying that he used to earn while in the employ of the defendant $1.80 a day, and that he worked steadily at his employment, as you will recall. To what extent he has been injured and his earning powers reduced, I will leave to you to determine under all the evidence in the case, and the damage he has sustained you will fix accordingly, taking into consideration his age, his previous health and manner of living. He would also be entitled to compensation for the pain and suffering which he has endured by reason of his injury, and for any inconvenience and disfigurement on account of the loss of his arm, not being able to help himself as before. All of these matters you will take into consideration, if you find that the defendant company is to blame, and that he is free from such, and award him such damages as you think he ought to have, under the circumstances.

I trust that you will deal with this matter as reasonable men, reviewing and considering the case dispassionately, without allowing your sympathy to cloud your better sense and good judgment.

I am requested to charge you by the defendant on a certain
59 point. The point is denied, without reading it.

(The defendant's point, which was refused by the Court without being read, is as follows:

"Under all the evidence, your verdict must be for the defendant.")

(Exception noted for the defendant to the refusal of the Court to affirm the point presented on behalf of the defendant, by direction of the Court.)

Mr. Prichard: I desire to except to that part of your Honor's charge which sets forth the three questions which are for the jury in this case, first, did the Master, the defendant in this case, through one Humphrey Davis, direct and instruct the plaintiff to reach under the block of slate, about to be lifted, and there to place the iron wedge in manner as testified by the plaintiff? Second, if so, was it reasonably safe to do so under the circumstances? And third, if not, and resulting in the injury to the plaintiff, was he free himself from contributing to the injury?

(Exception noted for the defendant as requested, by direction of the Court.)

Mr. Prichard: I also desire to except to that part of the charge of the Court which said "But on his (plaintiff's) part, it is contended that the situation in which he found himself at the time when the stone or slate block, properly speaking, was suspended or lifted by the

men was of an extraordinary character, then the plaintiff when about to place the iron wedge found the stone or block large, and threatening danger, as he believed, whereupon he was suddenly and hastily summoned and directed to act, whereupon he had but little or no time to judge of his own safety, and yielding to the judgment of his superior he acted."

(Exception noted for the defendant as requested, by direction of the Court.)

The Court: Gentlemen, the case is in your hands.

60 Counsel for the defendant requested the learned Judge to direct the stenographer to reduce the testimony and charge of the Court to typewriting, and file the same of record in the cause, which request was granted, and the stenographer was so directed.

After the jury had retired to their room the following question was propounded to the Court by them for answer:

"Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by Foreman Davis to 'push it under.'"

And answered by the Court as follows:

If he was told to put it under as stated by the plaintiff and he did so, fully appreciating at the time the danger attending and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence.

PHILADELPHIA, PA., Monday, November 27, 1916.

2 o'clock p. m.

Before Hon. Charles B. Witmer, J., Specially Presiding.

Present:

J. Willard Paff, Esq., representing the plaintiff.
Frank P. Prichard, Esq., representing the defendant.

61 Mr. Paff: If the Court Please, your Honor will no doubt recollect the trial of this case, and that after the trial of this case no exception or objection was made to any testimony, I do not think any objection was made on either side, and the plaintiff in this case did not except to your charge. We adjourned about 12 o'clock, or at the regular adjourning time. The jury went out to the jury room to deliberate and Mr. Smith and I came back a little after Court adjourned. We first went to the Clerk to see if the jury had come in. We found they had not. We came down to the office, and either Mr. Smith or myself was in the office of the Clerk until the jury came in and rendered its verdict, and it was not until later

in the day, when I came back to get a book of the Carlisle tables here, that I learned that an inquiry had been made to you by letter, and that that inquiry had been sent by a tipstaff or someone to the jury, without calling them in open court.

Now, if your Honor please, we are in a peculiar situation. We, of course, filed a bill of exceptions, but we do not have on the record anything more than that the inquiry was made to you and the reply that you made to the jury.

The Court: The reason I did not call the jury in at the time was because Judge Thompson was busy here trying a case, when that inquiry came in. The question was addressed to me while I was in chambers. Of course, I reduced my answer to writing, with instructions to make it a matter of record, so as to give you the advantage of any exception you may take.

Mr. Paff: Your Honor, in order that we may be protected in that regard, would there be any objection to our placing on the record the exact facts, because I find in looking over the cases in one or two of the cases that was not done, and when an appeal was taken, the parties found they had no standing in court at all, because the facts did not appear on the record. I could not find any practice in regard to that particular point. The case arose in 183 Pennsylvania,
62 a case I called your attention to, and I called Mr. Prichard's attention to it at the time I filed the motion. That was a Lancaster County case, and I wrote to one of the counsel who was still living in that case to ascertain how it had been brought up, and there it was brought up just as we have brought it up here on a motion, and as I recollect his letter—I do not have his letter with me—a notation was made on the record at that time, and the same thing occurred in a case in Ohio, 221 Federal, and I would like if the Court will permit me to place that on the record.

The Court: What do you propose? Do you have something prepared?

Mr. Paff: I had in mind this, to use the words that I have in my motion, and if there is any objection to them Mr. Prichard will call attention to it.

We move to have placed on the record at this time the following: After the trial Judge had completed his instructions and charge to the jury, and after the jury had retired for their deliberation, and while deliberating, the jury sent to the trial judge the following written inquiry, this written inquiry having been made after the jury had been deliberating for some time.

Is there any objection to that, Mr. Prichard?

The Court: That is true.

Mr. Prichard: If that is the fact, I suppose it is.

The Court: That is true. That is the fact.

Mr. Prichard: Then, of course, I have no objection.

Mr. Paff: The question is as follows: "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of con-

tributory negligence even though told by foreman Davis to 'push it under.'"

To which inquiry, in the form of a note, delivered to the trial judge, the trial judge sent the following written instructions
63 or reply to the jury room in the absence of the parties and their counsel, without the consent of the parties and their counsel, and without calling the jury in open court.

Is there any objection to that, Mr. Prichard?

Mr. Prichard: I do not think there is any objection to that.

Mr. Paff: The answer was as follows: "If he was told to put it under, as stated by the plaintiff, and he did so, fully appreciating at the time the danger attending, and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him, and apparent, he is guilty of contributory negligence."

Now, will the Court permit us to note our exception, or will the Court note an exception for us at this time on the record?

Mr. Prichard: There is no objection on our part.

The Court: An exception is noted for the plaintiff.

And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said plaintiff did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the plaintiff did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 3d day of November, A. D. 1916.

[SEAL.] CHARLES B. WITMER,
District Judge.

64 *Opinion.*

Filed Dec. 6, 1916.

Witmer, District Judge.

The reason assigned for a new trial has to do with a question and answer that passed between the Court and jury while the latter were deliberating. The jury retired shortly before the noon recess and not having reached a verdict when the Court resumed, Judge Thompson began the trial of a case in the room vacated by the trial Judge of the present case. While occupied in the discharge of his official duties in chambers, the jury presented to the Judge the written question, which was also answered in writing. The question and answer were returned by the jury and made a part of the record and are as follows:

Question: "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence even though told by Foreman Davis to 'push it under.'"

Answer: "If he was told to put it under as stated by the plaintiff and he did so fully appreciating at the time of the danger attending and having sufficient time to consider when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

While it is conceded that the practice here adopted does not deserve encouragement, however, under the peculiar circumstances of the case, there seems to be no reason why the course pursued was
65 not justifiable, rather than disturb the trial in progress to answer in open court a question that involved but a repetition of a legal principle; having answered in such a way as to enable the parties the opportunity of a review, their rights were as effectively secured as if the answer had been given in open court. And in this there was compliance with the prevailing rule that a new trial is not justified, unless some prejudice or disadvantage resulted to the parties thereby, which is not inferred where the communication is in writing, and the writing has been preserved, so that the instructions can be included in the bill of exceptions.

Shapley vs. Aaron S. White, 6 New Hampshire, 172; Buntin vs. Danville, 93 Virginia Reports, 213; The State of — vs. Smit, 20 Missouri Appeal Repts., 54.

In the case of Sommer vs. Huber, 183 Pa. 162, and others, where a new trial was allowed, the writing was not preserved thus bringing the case within the precautions exercised against giving oral instructions without reducing the same to writing in the presence of the parties, thereby rendering a review of such instructions practically impossible.

That the instructions given were in accordance with the law governing in the case, and that the manner in which the same were given worked no possible injury to the plaintiff remains to be the opinion of the Court. This motion is therefore denied.

Præcipe for Judgment.

Filed Dec. 21, 1916.

The Clerk will enter judgment on the verdict in the above entitled cause in favor of the defendant.

FRANK P. PRICHARD,
Attorney for Defendant,
Per J. W. BAYARD.

December 19th, 1916.

To William W. Craig, Esq., Clerk United States District Court.

66 *Judgment.*

Filed Dec. 21, 1916.

Before WITMER, *J.*

And now, to wit, this 21st day of December, 1916, in accordance with præcipe filed, judgment is hereby entered on the verdict in the above entitled case in favor of the defendant and against the plaintiff.

BY THE COURT.

Attest:
LEO A. LILLY,
Deputy Clerk.

Petition for Writ of Error.

Filed Jan. 18, 1917.

To the Honorable the Judges of the said Court:

Donatto Fillippon, plaintiff in the above entitled cause, conceiving himself to be aggrieved by the entering of judgment in favor of the defendant and against the plaintiff on the 21st day of December, 1916, hereby files his petition for a writ of error from such judgment, and prays that his petition may be allowed, and that a transcript of record and proceedings and papers upon which said judgment was entered, be authenticated and be sent to the United States Circuit Court of Appeals for the Third Circuit.

SMITH, PAFF & LAUB,
Attorneys for Plaintiff.

67 *Order of Court.*

Filed Jan. 18, 1917.

Before Witmer, J.

And now, to wit, this 18th day of January, 1917, it is ordered that the prayer for a writ of error be allowed.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

Assignments of Error.

Filed Jan. 18, 1917.

Now comes the defendant in the above entitled cause and files the following assignments of error upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the Sixth day of December, A. D. 1916.

First. The learned Court erred in that while occupied in the discharge of his official duties in Chambers, after the jury had retired to deliberate, the jury forwarded to the Judge the following written question in the absence of counsel and the plaintiff, and not in open Court:

Q. Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence even though told by Foreman Davis to 'push it under',"

to which written inquiry, in the form of the note delivered to the trial Judge, the trial Judge sent the following instructions to the jury room in the absence of the plaintiff and his counsel, and not in open Court:

"A. If he was told to push it under as stated by the plaintiff
68 and he did so fully appreciating at the time the danger attending, and having sufficient time to consider, when he was face to face with a situation, this would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

Second. The learned Court erred in its instructions to the jury in answer to the inquiry of the jury as follows:

"Q. Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence even though told by Foreman Davis to 'push it under'.

"A. If he was told to push it under as stated by the plaintiff and he did so fully appreciating at the time the danger attending and having sufficient time to consider when he was face to face with a situation, this would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

Third. The learned Court erred in privately communicating with the jury in the absence of the plaintiff and his counsel, and not in open Court.

Wherefore, the appellant prays that the said decree be reversed, and that the said District Court for the Eastern District of Pennsylvania be ordered to enter a decree reversing the decision of the lower court in said cause.

SMITH, PAFF & LAUB,
Attorneys for the Appellant.

69 *Præcipe Sur Transcript of Record.*

Filed Jan. 18, 1917.

To the Clerk of the United States District Court, Eastern District of Pennsylvania:

In making up the transcript of record, sur writ of error, in the above entitled case, you are to include the following papers:

Docket entries,
Writ of Error,
Statement of Claim,
Plea,
Bill of Exceptions,
Order refusing motion for new trial, &c.,
Præcipe for Judgment—Judgment,
Petition for Writ of Error,
Assignments of Error,
Clerk's Certificate,
and no others.

SMITH, PAFF & LAUB,
Attorneys for the Plaintiff.

70 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of so much of the Pleas and Proceedings in the case of Donatto Fillippon vs. Albion Vein Slate Company, No. 3636 March Sess., 1915, as per præcipe filed, a copy of which is hereto annexed, the transcript of record is to include and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 25th day of January, in the year of our Lord one thousand nine hundred and seventeen and in the one hundred and forty-first year of the Independence of the United States.

[SEAL.]

WILLIAM W. CRAIG,
Clerk District Court U. S.

71 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2223.

DONATTO FILLIPPON, Plaintiff in Error,

vs.

ALBION VEIN SLATE COMPANY, Defendant in Error.

And afterwards, to wit, on the sixteenth day of March, 1917, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs before the Hon. Joseph Buffington, Hon. John B. McPherson, and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the seventeenth day of May, 1917, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

72 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2223.

DONATO FILLIPON, Plaintiff Below,

vs.

ALBION VEIN SLATE CO.

Error to the District Court of the United States for the Eastern District of Pennsylvania (Judge Witmer, of the Middle District, Specially Presiding).

Before Buffington, McPherson, and Woolley, Circuit Judges.

McPHERSON, *C. J.*:

The plaintiff, an adult subject of the King of Italy, suffered injury while at work in the slate-quarry of the defendant, a Pennsylvania corporation. He was a rubbish hand or ordinary laborer, and this had been his occupation for more than a year. The defendant's quarry was operated by gangs, each gang comprising four block-men, and (at the time of the accident) one rubbish hand. The quarry is an open hole from which the rough blocks of slate are hoisted to the top of the ground by ropes or chains. After a block has been blasted out, it is tilted up by crowbars and by wedges of iron or wood so that the hoisting tackle may be fastened around it. Under small blocks the wedges are placed by the hand, which need
73 not go farther in than the edge of the block; under large

blocks, the wedges are pushed part of the way by the hand, and then a stick of some kind is used to push the wedge farther in, the workman being thus protected from injury in case the stone should slip or make some other unexpected movement. A rubbish hand is a general utility man and is expected to do whatever the foreman of the gang may direct. The plaintiff's experience had made him familiar with the work just described. His account of the accident was as follows: On July 31, 1914, a large block, several feet both in length and in breadth, had been blasted out and chains were about to be put around it. He was helping, and had inserted a wedge as far as possible without putting his hand under the stone. But the wedge had to go farther, and he was afraid to use his hand for that purpose, telling the foreman that he wanted to get something to push the wedge. Instead of consenting, the foreman ordered him to "Go ahead, go ahead," and he thereupon put his right arm under, the result being that the arm was so badly crushed by the sudden movement of the block that amputation was necessary. The court asked the jury to decide, whether the Company had been negligent, and whether, in view of the plaintiff's testimony that he was merely obeying the foreman, his obedience was excusable—in other words, whether he fully understood the danger and acted with reasonable care.

The plaintiff took no exception to the charge, the jury retired, and the court adjourned for the noon recess. After the recess the courtroom in which the trial had been held was occupied by another judge and another case, and Judge Witmer retired to his chamber. While the other case was proceeding, the jury sent a written question to Judge Witmer concerning the applicable rule of contributory negligence, and the judge returned a written answer. The question and answer were both preserved on the record, and the plaintiff was afterwards allowed an exception to the instruction thus given and also to the manner of giving it. The manner was objected to, on the
74 ground that the question was asked and answered in the method described, not in open court, in the absence of the parties and their counsel, and without their knowledge or consent. The verdict was for the defendant.

We need not discuss the question and answer themselves; they contain nothing of which the plaintiff can properly complain, the answer being slightly more in his favor than the charge itself. The point chiefly insisted on now is the alleged error in failing to give the instruction in open court. Upon this subject the federal courts have not yet passed, as far as we know, but numerous cases have arisen in the state courts and have resulted in two divergent lines of decision. The authorities are collected in a note to North Dakota v. Murphy, 17 L. R. A. (N. S.) 609 (1909), and we see no need to add a prolonged discussion to the 50 or more opinions already in the books. Numerically, the opposing cases are fairly equal, and in weight of argument also there is little to choose between them. The decisions that follow the earliest report—Sargent vs. Roberts, 1 Pick. 337—lay down the unbending rule that no communication should take place between a judge and the jury except in open court and (if practicable) in the presence of counsel; and some of them hold that communications of only slight importance will furnish ground for

reversal if they have been made in a different place and a different way. The other line of authorities accepts the rule as highly desirable but not as unbending, holding that the circumstances of each case should be carefully scrutinized in order to be sure that no harm has actually been done, and that no harm is likely to be done, by the kind of communication that may be under examination in a given case. In our opinion this is the better view, and we give it our approval, confining the decision to the situation now before us, namely, an ordinary civil (not criminal) case, where the jury has asked a plain question in writing concerning a matter of law, not a matter of fact, and where the judge has answered it in writing plainly and accurately, and nothing else has occurred—the question and answer moreover having been preserved of record, and counsel having been promptly informed of what has taken place, and having been given the opportunity of excepting to the substance of the instruction and to the manner of giving it. In the case in hand we think it plain that no harm was actually done, and it is not easy to see how harm is likely to happen under precisely similar circumstances, where a question of law only is propounded and is accurately answered. We do not say that harm could never happen in the exchange of such a question and answer; the variety and complexity of human affairs are so great that the same act may have a different quality if the atmosphere be different that surrounds it; but so far as we can see, harm is not probable. We agree fully that modifications of established practis- should be allowed with caution, and we see excellent reasons why every step in a trial up to the rendering of the verdict should be taken in open court, and (wherever practicable) in the presence of counsel also. But, after all this has been said, we are still brought to the question—Is there a compelling reason of policy why a trial fairly and accurately conducted must be always set aside where such an irregularity has crept in altho it has done no actual harm, and is unlikely to do harm?

We do not see our way to answer this question in the affirmative, and must therefore affirm the judgment.

Endorsed: No. 2223. Opinion of the Court, by McPherson, J. Received and filed May 17, 1917. Saunders Lewis, Jr., Clerk.

76 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2223 (List No. 28).

DONATTO FILLIPPON, Plaintiff in Error,

vs.

ALBION VEIN SLATE COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, May 17, 1917.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

Endorsed: No. 2223. Order Affirming Judgment. Received and filed May 17, 1917. Saunders Lewis, Jr., Clerk.

77 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Donatto Fillippon, Plaintiff in Error, vs. Albion Vein Slate Company, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-eight day of May in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-first.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

78 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Donatto Fillippon is plaintiff in error and Albion Vein Slate Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

79 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

80 [Endorsed:] 2223. File No. 26,089. Supreme Court of the United States, No. 622, October Term, 1917. Donatto Fillippon vs. Albion Vein Slate Company. Writ of Certiorari. Received Oct. 31, 1917. Saunders Lewis, Jr., Clerk.

81 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2223.

DONATTO FILLIPPON, Plaintiff in Error,

vs.

ALBION VEIN SLATE COMPANY, Defendant in Error.

Stipulation of Counsel.

Whereas, the Supreme Court of the United States on the 15th day of October, A. D., 1917, granted a writ of certiorari in the above entitled case,

Now, October 27, 1917, it is agreed and stipulated by and between Frank P. Pritchard of counsel for the Albion Vein Slate Company and Calvin F. Smith of Smith, Paff & Laub of counsel for Donatto

Fillippon, that the certified transcript of the record on file in the Supreme Court of the United States be taken as a return to the writ of certiorari allowed as aforesaid in Donatto Fillippon, petitioner, vs. Albion Vein Slate Company, No. 622 October Term, 1917.

And that a certified copy of this stipulation sent up to the Supreme Court of the United States by the Clerk of the United States Circuit Court of Appeals for the Third Circuit shall be taken as his return to the writ.

Philadelphia, Pa., October —, 1917.

(Signed) FRANK P. PRICHARD,
Of Counsel for Albion Vein Slate Company.

(Signed) CALVIN F. SMITH,
Of Smith, Paff & Laub,
Of Counsel for Donatto Fillippon.

Endorsed: No. 2223. Stipulation of Counsel. Received & Filed Nov. 3, 1917. Saunders Lewis, Jr., Clerk.

82 UNITED STATES OF AMERICA,
Third Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Donatto Fillippon, plaintiff in error, vs. Albion Vein Slate Company, defendant in error, No. 2223, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Third Circuit, at office in the city of Philadelphia, Pennsylvania, this sixth day of November, A. D. 1917.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, Jr.,
Clerk of the United States Circuit Court
of Appeals for the Third Circuit.

83 [Endorsed:] File No. 26,089. Supreme Court U. S., October term, 1917. Term No. 622. Donatto Fillippon, Petitioner, vs. Albion Vein Slate Co. Writ of certiorari and return. Filed November 7, 1917.

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

THE PETITION OF DONATTO FILLIPPON FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO BRING BEFORE THE SUPREME COURT THE CASE OF DONATTO FILLIPPON, PLAINTIFF-IN-ERROR, AND APPELLANT,

AGAINST,

ALBION VEIN SLATE COMPANY, DEFENDENT-IN-ERROR, AND APPELLEE,

RESPECTFULLY SHOWS to this Court as follows:

FIRST: That your petitioner at the time of the Commencement of the suit was a citizen of the Kingdom of Italy and a subject of the King of Italy and the defendant and respondent was at that time a corporation duly organized and existing under the laws of the State of Pennsylvania.

SECOND: That on or about the 31st day of July, 1914, the Albion Vein Slate Company was engaged in the mining and quarrying of slate and slate products and operated a slate quarry near the Borough of Pen Argyl, in the County of Northampton, State of Pennsylvania, United States of America, and employed Donatto Fillippon as a rubbish hand.

THIRD: That the Albion Vein Slate Company on the 31st day of July, A.D., 1914, carelessly and negligently employed methods, means, instrumentalities and machinery not in common and ordinary use but more dangerous than those in common and ordinary use, failed to furnish a reasonably safe place for the said Donatto Fillippon to work and by its foreman directed the said Donatto Fillippon to place a wedge under a block of slate, which though not immediately and imminently dangerous, threatened such danger that the said Donatto Fillippon demurred and stated his fears as to the threatened danger and proceeded to procure a stick for the purpose of pushing the wedge under the slate, whereupon the foreman gave him imperative orders and directions to put the wedge under the block of slate with his hand when the block tilted and crushed the right arm of Donatto Fillippon above the elbow which necessitated the amputation of the arm, thereby permanently disabling the said Donatto Fillippon and preventing him from earning a livelihood for himself and resulting in great pain and suffering to the damage of said plaintiff.

FOURTH: That on the 10th day of May, 1915, a praecipe for summons in trespass was filed for and on behalf of Donatto Fillippon against the Albion Vein Slate Company in the office of the Clerk of the District Court of the United States for the Eastern District of Pennsylvania, and the same day a summons in trespass issued out of said court returnable the first Monday of June next, and a statement of claim for $10,000 damages with rule to plead was filed. Subsequently, the writ of summons was returned, served and filed.

FIFTH: That on the 19th day of April, 1916, the plea of "Not guilty" was filed in the Office of the Clerk of the

District Court of the United States for the Eastern District of Pennsylvania on behalf of the defendant company and the case ordered on the trial list without any further affidavit of defense or answer filed to the statement of claim.

SIXTH: That on the 9th day of October, A. D., 1916, the above suit came on for trial before the Honorable Charles B. Witmer, District Judge for the Middle District of Pennsylvania, specially presiding, and a jury being called on the same day, returned a verdict in favor of the defendant on the 10th day of October, 1916.

SEVENTH: After retiring for deliberation, the jury or some member thereof, sent from the jury room to the Judge in Chambers, the following written note:

> "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence even though told by Foreman Davis to 'push it under'."

Without calling the jury into open court and without notifying counsel who were in court, the Trial Judge sent the following written instruction to the jury room from Chambers:

> "If he was told to push it under, as stated by the plaintiff, and he did so, fully appreciating at the time the danger attending, and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the danger known to him, and apparent, he is guilty of contributory negligence."

EIGHTH: That on the 13th day of October, A.D., 1916, a motion and the following reasons for a new trial were filed:

(*a*) That it was error for the trial judge to send secret instructions to the jury not in open court and without notifying counsel, and

(*b*) That the instructions in themselves were erroneous.

NINTH: That on the 30th day of October, 1916, bills of exceptions were allowed and filed to the action of the court in giving the instructions to the jury, not in open court, without notifying the parties or their counsel, as well as to the substance of the instructions, which said bills of exceptions were sealed by order of the Court, dated November 3, 1916.

TENTH: That on the 6th day of December, 1916, the Trial Judge filed an opinion denying the motion for a new trial and on the 21st day of December, judgment was entered on the verdict.

ELEVENTH: That on the 18th day of January, 1917, a petition for writ of error was filed, which was allowed by the said Honorable Charles B. Witmer, District Judge for the Middle District of Pennsylvania, specially presiding: and on the same day the following were filed: The assignments of error; bond for costs sur writ of error; order of court approving bond sur writ of error and a copy thereof lodged in the Clerk's Office for adverse party, and on the same day a citation was allowed and issued and it was ordered that a certified transcript of the record of the proceedings in said case be filed, which said citation was on the 20th day of January, 1917, returned, service

accepted and filed, and the record duly transmitted to the Circuit Court of Appeals for the Third Circuit.

TWELFTH: That a certified transcript of the record and of all proceedings in the case was duly so transmitted to the United States Circuit Court of Appeals for the Third Circuit and on or about the 16th day of March, A. D., 1917, the appeal by your petitioner from the judgment so as aforesaid entered upon the verdict for the defendant came on to be heard and was argued by counsel for all parties before Judges Buffington, McPherson and Woolley, and thereafter on the 17th day of May, 1917, said Court of Appeals rendered and filed an opinion and decision written by Judge McPherson, which among other things held that the instructions given by the Trial Judge in the form of a note sent from Chambers to the Jury Room without notifying counsel were not erroneous, and that it was not error for the Trial Judge to hold private communication with the jury after the jury had retired and to give instructions not in open court to the jury without notifying counsel, particularly if the subject of the instructions was preserved and made a part of the record. Said opinion and decision affirmed the judgment of said District Court.

THIRTEENTH: The questions and propositions of law involved in this case are substantially as follows:

(*a*) Whether the court erred in giving private instructions to the jury in the form of a written note and sent to the jury by the Court in Chambers while the jury was deliberating without the consent of plaintiff or his counsel who were in court at the time and which instruction was not given in open court.

(*b*) Whether the court erred in the substance of the instructions sent to the jury room in answer to the question propounded to the court by the jury in writing.

FOURTEENTH: That the questions and propositions of law involved under subdivision (*a*) of the foregoing paragraph were raised flatly in the case before the Circuit Court of Appeals for the Eighth Circuit and decided contrary to the decision of the Circuit Court of Appeals for the Third Circuit in the present case.

FIFTEENTH: That the questions and propositions of law involved under subdivision (*a*) were also raised in the Circuit Court of Appeals for the Sixth Circuit in a case decided by the Supreme Court of the United States. Both the Supreme Court of the United States and the Circuit Court of Appeals for the Sixth Circuit indicated that instructions to the jury had to be delivered in open court unless waived by the consent of the parties or their counsel.

SIXTEENTH: That the Supreme Court of Pennsylvania in a number of decisions decided that all instructions to the jury must be given in open court where they may be heard by the parties and their counsel, the State of Pennsylvania being in the district and circuit in which the cause of action originally arose and in which it was tried.

SEVENTEENTH: And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons among others:

1. Because the Circuit Court of Appeals of the Eighth Circuit has held that it is error to deliver instructions to a jury not in open court, which is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case under consideration.

2. Because the Circuit Court of Appeals for the Sixth Circuit has indicated by its decision that all instructions to the jury must be in open court which is contrary to and in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case under consideration.

3. Because the affirmance and approval of the practice of giving private instructions to the jury not in open court is at variance with the law as indicated by the opinion of the Supreme Court of the United States that instructions to a jury must be given in open court.

4. Because the questions of law involved herein have not been directly passed upon by your Honorable Court.

5. Because the public interest and the interests of jurisprudence require the decision of this court upon the question of law involved herein, particularly with reference to the general rule of practice whether instructions to the jury can be given otherwise than in open court.

6. Because there is a conflict in this respect between the law as expounded by the Circuit Court of Appeals for the Third Circuit in the case under consideration and the rule observed and laid down by the Circuit Courts of Appeals in other Circuits and the rule observed and recognized by the Supreme Court of the United States, as well as by the highest appellate courts of the

State of Pennsylvania held in the said district and circuit with reference both to the rule of practice and the substance of the instructions.

7. Because the opinion of the Circuit Court of Appeals for the Third Circuit in the case under consideration is in conflict and at variance with the rule observed and laid down by a majority of the appellate state courts of other states.

8. Because for the sake of uniformity of decisions, the Supreme Court of the United States should declare the rule of practice with reference to the giving of instructions to juries not in open court and not in the presence of counsel.

WHEREFORE, Your petitioner prays that your Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals to the Third Circuit to bring up this case to this Honorab Court for such proceedings as to this Honorable Cour may seem just.

DONATTO FILLIPPON.

EASTERN DISTRICT OF PENNSYLVANIA } ss.
THIRD CIRCUIT.

Donatto Fillippon, being duly sworn, says: I have read the foregoing petition. The same is true to my knowledge, information and belief; my knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the court in which this action has been heard.

DONATTO FILLIPPON.

Sworn to before me
this 31st day of
July, A.D., 1917.

HELEN M. GOULD.

Notary Public, Easton, Penna.
Commission expires Feb. 19, 1921.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well-founded and that the case is one in which the prayer of the petitioner should be granted by this court.

CALVIN F. SMITH.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

IN THE MATTER OF PETITION OF DONATTO FILLIPPON FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO BRING BEFORE THE SUPREME COURT THE CASE OF DONATTO FILLIPPON, PLAINTIFF, IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PLAINTIFF-IN-ERROR AND APPELLANT IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

AGAINST

ALBION VEIN SLATE COMPANY, THE DEFENDANT IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DEFENDANT-IN-ERROR AND APPELLEE IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER SUR PETITION FOR WRIT OF CERTIORARI.

Donatto Fillippon petitions the Supreme Court of the United States in this case for writ of certiorari on the ground that the case involves a matter of great general importance and involves the great principle in American jurisprudence whether trial by jury shall

remain as heretofore and whether the deliberations of the jury, after retiring to the jury room, are to be inviolate or whether they are to be subject to secret instructions from the trial Judge in Chambers, not in open court, without the presence and without the knowledge of counsel at the time when the instructions were sent, although parties and counsel were present in court at the time. It involves the great principle of American liberty, whether a man whose life, liberty or property is at stake shall have the right of a fair and impartial trial by jury in open court with the right to be at all times represented by counsel during the trial from beginning to end, so that after the trial is over the defeated litigant can feel that there was nothing suspicious in the trial and not only that he did not know of anything suspicious.

The trial Judge in the case under consideration, in reply to a question pertaining to the law of the State of Pennsylvania, to which his reply would have to be "no" if answered in the form submitted to him, by adding qualifications to the answer and by interjecting elements into the question which were immaterial and have never been recognized either in this state or anywhere else as entering into the question of determining whether the plaintiff as a matter of law was prevented from recovering by his own contributory negligence, answered the question in the affirmative.

We further respectfully submit that in this case the necessity of avoiding conflict between decisions of the following courts of appeal, to-wit: the Supreme Court of the United States, the Circuit Court of Appeals for the Eighth Circuit, the Circuit Court of Appeals for the Sixth Circuit and the Supreme Court of Pennsylvania,

which is the highest state court of appeals in the State of Pennsylvania, as against the decision in this case in a matter affecting the interest of the people as a whole, demands the exercise by your Honorable Court of settling this important question by a decision of the highest court of the nation.

This doctrine was laid down by your Honorable Court in the case of Forsyth *vs.* City of Hammond, 166 U. S. 506, 41 L. Ed. 1095, where in an opinion by Mr. Justice Brewer the rule is enunciated as follows:

> "We re-affirm in this case the propositions heretofore announced, to wit: that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendancy, provided the case is one which but for this provision of the statute would be finally determined in that court, and further that while this power is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between the courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

In line with the language of Mr. Justice Brewer, as reiterated, the policy of your Court in exercising its right to issue writs of certiorari but sparingly unless those compelling reasons, to-wit: the necessity of avoiding

conflict between two or more courts of appeals, or between courts of appeal and the courts of a state, or a question not merely private but affecting the whole matter of jurisprudence for the whole nation, we respectfully submit that the matter which is brought to the attention of your court by the petition for a writ of certiorari, presents at least two of those compelling reasons. First: a conflict between two or more courts of appeal, Federal and State, and Second: a conflict between a federal court of appeals and the highest appeal court of the State of Pennsylvania, coupled with a matter of such prime importance to the whole nation as the preservation of the jury room from outside influence and communications. The jurisdiction of the Federal Courts in this case rested entirely on the diversity of the citizenship of the plaintiff and defendant and, therefore, an appeal did not lie from the circuit court of appeals, and but for a writ of certiorari the petitioner would be without remedy.

The argument as contained in this brief will be divided into two main questions. The first is,

1. Did the trial Judge err in giving written instructions to the jury after the jury had retired to deliberate, not in open court, nor in the presence of the parties or their counsel and given with their knowledge?

2. Were the instructions erroneous?

It is with reference to the former question that we claim there is a conflict in decisions of the Circuit Court of Appeals by the Judges of the Third Circuit in the case under consideration differing and deciding contrary to the decisions of the Circuit Court of Appeals of the Sixth

Circuit and the Circuit Court of Appeals of the Eighth Circuit, as well the doctrine of the Supreme Court on the same subject, and as also differing and being in conflict with the decisions of the Supreme Court of Pennsylvania which is the highest appellate court in the State of Pennsylvania, as well as the decisions of most of the other states. The Circuit Court Judge McPherson of the Third Circuit in his opinion on the question of whether it was error for the trial Judge to give written instructions in answer to a request from the jury not in open court and not in the presence of, nor with the knowledge of counsel then present in open court, states in his opinion, as follows:

> "Upon this subject the federal courts have not yet passed, as far as we know, but numerous cases have arisen in the state courts and have resulted in two divergent lines of decision. The authorities are collected in a note to North Dakota *vs.* Murphy, 17 L. R. A. (N. S.) 609 (1909), and we see no need to add a prolonged discussion to the 50 or more opinions already in the books. Numerically, the opposing cases are fairly equal, and in weight of argument also there is little to choose between them."

We respectfully submit that the learned Circuit Judge who wrote the opinion evidently overlooked certain portions of the brief for the plaintiff-in-error submitted at the time of the argument of the case before the Circuit Court of Appeals for the Third Circuit, because special attention was called in the brief to the decision of the Circuit Court of Appeals for the Sixth Circuit in Yates *vs.* Wheyl Coke Company, 221 Federal Reporter, 603, as well as the opinion of the Circuit Court of Appeals for the Eighth Circuit in Aerheart *vs.* St. Louis I. M. &

S. Ry. Co., 99 Federal 907, as well as the opinion of Mr. Justice Gray in Stewart *vs.* Wyoming Ranch Co., 128 U. S. 383 (32 L. Ed. 439) and the printed brief submitted at the time contained copious extracts from the opinions on this very question. The learned Circuit Judge who wrote the opinion of the Circuit Court of Appeals for the Third Circuit also evidently forgot during the time that intervened between the time of the argument and the time of writing the opinion that a special effort was made to bring the decisions in the above cases to the attention of the court at the time of argument. When the learned judge of the Circuit Court of Appeals further refers to the numerical equality of the two lines of cases as given in the footnote of North Dakota *vs.* Murphy, 17 L. R. A. (N. S.) 609, we also must differ as to any numerical equality existing or anything near a numerical equality. We concede that the decisions of the state courts of the State of New Hampshire and Virginia are at variance with all the rest but we will not concede that there is anything like any equality numerically. Not that we are contending that your Honorable Court or any other appellate court should erect for themselves scales and throw all the decisions into one side or the other of the scale and thereby decide which line of cases to follow, because it is a question of reasoning and justice that we are trying to present and impress on this court and not a question of arithmetic.

The only case that we have been able to find in which the question was raised before the Supreme Court of the United States was the case of Stewart *vs.* the Wyoming Ranch Co., 128 U. S. 383, (32 L. Ed.) 439, where in an opinion by Mr. Justice Gray the question is referred to as follows:

"The remaining objection argued is to an instruction given by the judge to the jury in response to a question asked by them upon coming into court after they had retired to consider their verdict. It is a conclusive answer to this objection, that no exception was taken to this instruction at the time it was given, or before the verdict was returned. The fact that neither of the counsel was then present affords no excuse. Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions. The absence of counsel, while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

It will be noted that in this particular case the instructions were given in open court. Counsel were not present at the time the instructions were given, but particular attention is called to the fact that the language of the learned judge limits the power and duty of the trial Judge to instruct the jury in "open Court."

The question was flatly raised before the Circuit Court of Appeals for the Eighth Circuit in the case of Aerheart *vs.* St. Louis I. M. & S. Ry. Co., 99 Federal Reporter 907. The Circuit Judges who heard the case were Cladwell, Sanborn and Thayer, and in the opinion by Circuit Judge Thayer, we have the following:

"The practice of sending written instructions to the jury room, or holding other written communication with the jury, after they have retired to consider their verdict, without knowledge of counsel for the respective parties, has been condemned in numerous well considered cases and has only been upheld in a few instances. Chouteau *vs.* Iron Works, 94 Mo. 388, 7 S. W. 467; State *vs.* Patterson, 45 Vt. 308; Bank *vs.* Mix, 51 N. Y. 558; O'Connor *vs.* Guthrie, 11 Iowa, 80; Campbell *vs.* Beckett, 8 Ohio St. 210; Hobert *vs.* State, 3 Minn. 262 (Gil. 181). See contra Bassett *vs.* Manufacturing Co., 28 N. H. 457; Goldsmith *vs.* Solomons, 2 Strob. 296. It will accordingly be conceded that such practice is erroneous, and ought not to be sanctioned."

The question was recently raised in the case of Yates *vs.* Wheyl Coke Company, 221 Federal Reporter 603, before the Circuit Court of Appeals for the Sixth Circuit, Judges Knappen, Denison and Sater, where in an opinion by District Judge Sater, sitting as the Court of Appeals for the Sixth Circuit, it was held:

"A trial court should avoid instructing a jury in the absence of counsel for the respective parties, when it can conveniently do so, and especially where the supplemental charge covers propositions of law not dealt with by the original charge; but the rule which controls is thus stated by Mr. Justice Gray in Stewart *vs.* Wyoming Ranch Co., 128 U. S. 383, 390, 9 Sup. Ct. 101, 104 (32 L. Ed. 439): 'the absence of counsel, while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the

> law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record'."

It will be noted that in the latter case, as well as in the case of Stewart *vs.* Ranch Company, supra, the instructions were given in open court, but not in the presence of counsel and while it was held that this was not error, the power and duty of the judge to instruct the jury is limited entirely to the open court and is not extended either by Mr. Justice Gray or by District Judge Sater to the jury room by written communication, and it is conceded by Circuit Judge Thayer that it is erroneous to give such instructions.

We will next pass to the conflict between the decision of the Circuit Court of Appeals for the Third Circuit as ennunciated by Circuit Judge McPherson and the Supreme Court of the State of Pennsylvania, and will then pass to the various cases decided by the highest courts of appeal of other states.

The question of private communications, not in open court, by the Court to the jury in the line of further instruction seems to have been brought to the attention of the Appellate Court of Pennsylvania for the first time in Earon *vs.* Mackey, 106 Pa. 452, and in this very case the distinction which the Court makes in the opinion refusing a new trial is shattered at once. In Earon vs. Mackey, supra, the question which the jury asked and the instructions which the Court gave were preserved, but unfortunately there was no bill of exceptions to the action of the Court. The Supreme Court of Pennsylvania condemned the practice, and stated its position with

reference to a communication not made in open court as follows:

> "It is irregular and erroneous for the Court to send instructions to the jury during their deliberations and in answer to their request for information, the jury being in their room and not in the presence of the Court."

And Mr. Justice Sterrett, with reference to this question, states as follows in the opinion on page 457:

> "There is nothing in the record on which to base the second specification of error. The depositions taken on the motion for a new trial are no part of the record. It does appear, however, in a note appended by the learned Judge to his charge that after being out all night the jury, in a paper signed by their foreman, asked a question, which was answered by the Court in the affirmative, but he does not say the answer was conveyed by tipstave. If it was so communicated to the jury not then in the presence of the Court, the proceeding was irregular and erroneous, but we can take no notice of any fact or circumstance that occurs during the deliberation of the jury unless it is regularly brought to our attention by bill of exceptions."

We respectfully submit that the gist of the impropriety does not lie in the bare communication or in its substance, but it lies in the communication in the form of instructions being made, not in open court. That this is so is plainly apparent from the syllabi in Sommer *vs.* Huber, 183 Pa. 162, where it was held as follows:

"Instructions to the jury must be given in open court, where they may be heard by the parties and their counsel."

"It is error for the trial Judge, in the absence of the parties and their counsel, to send written instructions to the jury after they have retired, although sent in answer to a written request from the jury for instructions."

This case was reversed on this specific ground, and from the extract of the arguments of counsel it would appear that appellee's counsel urged the same argument which the Court below adopted as its reason for justifying the communication, but in spite of this, the Supreme Court reversed on the ground "of an unwarranted departure from the rule which condemns secret instructions to the jury in relation to questions raised by the pleadings or the evidence as opposed to the proper administration of justice."

The question was again raised in Pennsylvania in Commonwealth *vs.* House, 6 Pa. Super. Ct. 92, where the Superior Court of Pennsylvania in an opinion by President Judge Rice reviews the authorities as follows:

"Unquestionably the Court has discretionary power, of its own motion, to recall the jury and give them further instructions, or withdraw or correct erroneous instructions. As far as we are informed, the usage of the courts of the Commonwealth has been to give such additional instructions only in open court, and this is the safer and the better practice. At all events, this much is established by the overwhelming weight of authority, that it is re-

versible error to give them after the adjournment of court in the absence and without the knowledge of the parties or their counsel: McNeil *vs.* State, 47 Ala. 498; Collins *vs.* State, 33 Ala. 434; Wade *vs.* State, 12 Ga. 25; Fisher *vs.* People, 23 Ill. 283; Crabtree *vs.* Hagenbaugh, 23 Ill. 349; Fish *vs.* Smith, 12 Ind. 563; O'Connor *vs.* Guthrie, 11 Iowa, 80; Sargent *vs.* Roberts, 18 Mass. 337; Merrill *vs.* Nary, 92 Mass. 416; Read *vs.* Cambridge, 124 Mass. 567; Benson *vs.* Clark, 1 Cow. 258; Moody *vs.* Pomeroy, 4 Den. 115; Taylor *vs.* Betaford, 13 Johns. 487; Bank *vs.* Mix, 51 N. Y. 558; People *vs.* Maurer, 43 N. Y. 1; Hobert *vs.* State, 3 Minn. 262; Kirk *vs.* State, 14 Ohio, 511; State *vs.* Patterson, 45 Vt. 308.

"Against this weight of authority (quoting from the opinion of Mr. Justice Gray in Read *vs.* Cambridge, supra), the only cases brought to our notice which countenance a different rule are two in New Hampshire and one in South Carolina, and in the latter the point adjudged related only to instructions as to the form of the verdict given by the Judge to the foreman in open court; and the criticism upon the judgment of this court in Sargent *vs.* Roberts (18 Mass. 337) was based upon the singular theory that the intercourse between the jury and the Bench is so confidential that often communications from the jury ought not to be disclosed to the bar."

The judgment in Com. *vs.* House, supra, was also reversed, and it may be added that the written question and the written instruction to the jury were known and made a part of the record.

The universal rule adopted by the appellate courts

of New York is that any communication, whether material or not, prejudicial or not, nullified the verdict if not made in open court without the consent of the parties or their counsel, and while it is a fact that there is one case, Thayer *vs.* VanLeet, 5 Johns. 111, to the contrary, this case was overruled subsequently in Taylor *vs.* Betsford, 13 Johns. 487; Moody *vs.* Pomeroy, 4 Denio, 115; Watertown Bank *vs.* Mix, 51 N. Y. 558, and Neil *vs.* Abel, 24 Wend. 185.

In Crabtree *vs.* Hagenbaugh, 23 Ill. 149, sc. 76 Am. Dec. 694, it was held by the Supreme Court of Illinois that the policy of the law requires that all proceedings should be open and notorious, and that the losing party should not be obliged to go to the inconvenience of offering proof that even an error had been committed.

In Danes *vs.* Pearson, 6 Ind. App. 465, 33 N. E. 976, it was held by the Appellate Court of Indiana that a communication between the Court and jury is improper and nullifies the verdict, even though the communication is harmless in itself.

In the case of Sargent *vs.* Roberts, 1 Pickering, 337, which is considered the leading case on this subject, the Appellate Court admits that the practice of the trial Judge communicating with the jury not in open court and without the presence of the parties, was so long established that nobody questioned its impropriety and was a practice which he had indulged in often himself, but proceeded to denounce and condemn the practice and reversed the judgment, and in doing so said it should no longer continue. It might also be added that the communication in that case was preserved so it could be known exactly what was communicated.

In Mier *vs.* Morgan, 82 Wis. 289, 52 N. W. 174, the highest Appellate Court of Wisconsin held as follows:

> "But whether counsel be present or not, if the jury are to be further instructed, they should be brought into open court. The rule is strict, but salutary. All court proceedings should be in the open.....Nor should a defeated party be required to show that such a communication as here had was in fact prejudicial. He is in fact entitled to have his case tried in open court from start to finish. There is safety from no other rule."

In the case of Cook *vs.* Green, 6 N. J. L. 109, the Judge called upon the attorneys to go with him to the jury room for the purpose of giving further instructions, in answer to a request from the jury. The counsel refused, and the Appellate Court held that the giving of such further instruction was not error, because he did not do it secretly, nor did he hold private conferences with the jury, and that if he had not notified the parties or their counsel, then it would have been such an outrage upon the essential forms of the trial as to vitiate the proceedings.

In Chicago, etc., *vs.* Robins, 43 N. E. 332, the request of the jury and the answer of the Judge were preserved, but the Appellate Court of Illinois held:

> "The more important and serious matter, however, is that the jury were not brought into open court."

In O'Connor *vs.* Guthrie, 11 Iowa, 80, the Judge, in answer to an inquiry in writing from the jury, in the same manner, sent by the bailiff, an instruction material

to the determination of the case, and this was done without the knowledge of either party. The Court reversed the judgment, and held that further instructions given to the jury had to be given in public and in open court, so that an opportunity may be afforded the parties to know what instructions were given and ask for such other explanation of the instructions as may be deemed necessary.

In Lowe *vs.* Freeman, 117 Ind. 341, sc. 20 N. E. 242, there were questions propounded by the jury to the Judge after retiring and the Court wrote on the communication from the jury and returned it to them, and while the instruction was proper, the Appellate Court held in reversing the judgment that it should have been given by calling the jury into open court.

In Greely *vs.* Weaver, 5 Atl. 267, the Appellate Court of Maine held that the Court has no right to send an answer to the jury to a question propounded to him in writing by the jurors after they have retired to deliberate on their verdict, without the consent of counsel.

In Hopkins *vs.* Bishop, 91 Mich. 328, sc. 51 N. W. 902, it was held by the Appellate Court of Michigan that it was error for the trial Court to send additional instructions to the jury room in response to a written request from the jury without the knowledge of the parties litigant and without giving them an opportunity of being heard.

In Choteau *vs.* Jupiter Iron Works, 94 Mo. 388, sc. 7 S. W. 467, the Appellate Court of Missouri held that all instructions should be read to the jury and in open court, and where after retiring, the jury desires further

instructions on the law of the case it should be brought into court to receive such further instruction, and if in answer to a request further instructions are sent to the jury by the bailiff in charge, the records should show the consent of the parties to this procedure.

The Court in this case particularly calls attention, like President Judge Rice, in the case of Commonwealth *vs.* House, supra, to the fact that the courts of New Hampshire and South Carolina hold to a different rule and are the exceptions.

Is it not singular that the trial Court, in order to justify its action in giving private instructions to the jury not in open court, and upon which the trial Judge bases his opinion for the refusal of a new trial, resorts to a New Hampshire case and also a case in 20 Missouri Appeal Reports, the decision in which case must have long preceded the case of Choteau *vs.* Jupiter Iron Works, supra, which is found in 94 Missouri, 388?

In the case of Martin *vs.* Martin, 76 Nebr. 335, sc. 107, N. W. 580, the Appellate Court of the State of Nebraska held that it was error for the Court, after the jury had retired, to return an answer to a written communication from them without bringing them into court.

In the case of Mosley *vs.* Washburn, 165 Mass. 417, which is the only case that seems to differ from the universal trend of opinion in that State, the reason stated for the deviation from the general rule is that the only communication sent to the jury was with reference to the computation of interest and the Appellate Court held that since the interest was a mere matter of computation and which the Court could direct the jury to

calculate after they had returned a verdict in favor of the plaintiff without calculating the interest, therefore, the error was of such a nature as would not be held to vitiate the verdict.

In the case of Texas Midland Railroad *vs.* Byrd, 115 S. W. 1163, the Texas Supreme Court held that it is reversible error for the Judge to communicate with the jury otherwise than as provided by law, as by holding conferences with the foreman not in open court and in the opinion by Chief Justice Gaines, a number of cases are cited for the proposition set forth in the syllabus hereinbefore stated. All the authorities, both for and against the proposition, are collected in the note of State *vs.* Murphy, 17 L. R. A. (N. S.) 609, from which it will appear that the exceptions are the cases cited by the learned Court below as a basis for refusing a new trial and we respectfully submit that no matter what the practice may be in New Hampshire and in an isolated case in Virginia and Missouri, it seems that the Federal Courts of this country have recognized the same principle which we are contending for, to-wit: that any additional instructions given to the jury after the jury have started to deliberate must be in open court and even though they can be given without the presence of the parties or their counsel, the failure to give such instruction in open court admits of no exception.

The second question, to-wit: whether the instruction given in writing to the jury not in open court after retiring for deliberation in answer to a note from someone in the jury room, arises as an incident in the matter of a petition for a writ of certiorari. If our right to a writ of certiorari was based entirely upon the substance of the instruction we could only urge that the instruction sent

by the trial judge to the jury room not in open court was in conflict with the rule laid down by the Supreme Court of Pennsylvania in cases of this kind, and that the rule so in conflict with the highest appellate court of the state in which it was tried was subsequently affirmed by the Circuit Court of Appeals for the Third Circuit thereby constituting a conflict in the law pertaining to negligence and contributory negligence as ennunciated by the Supreme Court of the State when an employee is working under the direct eye and instruction of the master and obeys the orders and instructions of the master after voicing his doubt as to the propriety and the imminence of the danger to be encountered by following his master's instructions. The question that was presented in the written note to the Judge in Chambers was as follows:

> "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand and having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by foreman Davis to 'push it under'."

We feel safe in saying that the answer to this question in any state in this Union would have been "No," because the facts as embodied in the question would not make the employee guilty of contributory negligence as a matter of law, but it was one of the questions that had to be submitted to the jury for decision. That it is so is clearly held in 29 Cyc. 640, where the general rule is laid down as follows:

> "The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law but the question should be submitted to the jury."

Instead, however, of answering this question in the only way in which it could be answered as stated, the court adds a lot of elements, qualifications and conditions and by adding those qualifications, elements and conditions the court was enabled to answer the question in the affirmative instead of the negative and in this we say the injury to the plaintiff consisted. We respectfully submit that if this instruction had been given in open court in the presence of counsel we could have called to the attention of the court and could have requested the court to charge on this point in the language and according to the authorities of the State of Pennsylvania.

An analysis of the answer creates just a suspicion that it was framed with desire to answer in the affirmative. The learned trial judge starts out in his answer, "If he was told to push it under, as stated by the plaintiff, and he did so," there is not much question that this was done, and in fact, this was assumed in the question sent by the jury. The learned trial judge continues further and states "fully appreciating at the time the danger attending," that much also was assumed in the question and therefore did not require any repetition. The learned trial judge then continues, "and having sufficient time to consider." It is hard to understand what difference it would make if a man had sufficient time to understand if he already appreciated the danger. It cannot be assumed that he could get any enjoyment out of musing and meditating upon a danger with which he was already fully acquainted and sufficient time to consider the danger, would hardly be any element if he had to a week consider upon a risk or a danger with which he was already fully conversant. The learned trial judge further says that "when he was face to face with the situation, that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of

the danger known to him and apparent, he is guilty of contributory negligence." The Supreme Court of the State of Pennsylvania, however, has said that even though the employee was fully aware of the danger threatening and if the risk or danger did not threaten imminent or immediate injury, so that a following of the employer's instructions would not mean certain injury, that then if the employee overruled his better judgment and followed the instructions of his superior and injury followed, that he could not be held guilty of contributory negligence as a matter of law. It was for the jury to decide whether the danger impending was so imminently and irrestibly threatening that a reasonably prudent man should have known that an obedience to orders would be followed by certain injury. The following cases decided by the Supreme Court of Pennsylvania, the highest appellate court in the State, clearly show that the instructions as given by the trial judge were erroneous.

The rule was clearly laid down by the Supreme Court of the State of Pennsylvania in Glew *vs.* Pittsburgh Railways Company, 234 Pa., 238, where Glew, a motorman in the employ of the defendant company, was engaged to run a freight car whenever and wherever directed by the superintendent of the defendant's supply department; that on the day of the accident he was instructed to run his car with a load of old wheels on board, and pulling a gondola car loaded with coal behind, over a certain line, the tracks of which were out of repair; that the plaintiff suggested this fact to the superintendent, or his representative, and said that it was dangerous to run the kind of load that he was hauling over these tracks, when he was told that he should proceed to do as he was ordered or he "would learn what would happen to him;" that he carried out the directions of the superintendent, and while on the

line the tracks separated, causing the gondola car to drop down and break an axle, with a resulting shock to the freight motor car which displaced the old car wheels and caused one of them to fall upon and injure the plaintiff. The plaintiff admitted on cross-examination that he knew that the tracks were in a dangerous condition; that he protested against running his cars baded as they were on those tracks, but stated that the superintendent, or his representative, insisted on him doing what he did. On page 242 of the opinion, which was adopted by the Supreme Court, the Court expressly held as follows:

> "It struck us at the trial, and does yet, that the Court would have erred had it said as a matter of law that the platintiff was guilty of contributory negligence.
>
> "The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law, but the question should be submitted to the jury. 29 Cyc. 640."
>
> "Again, it is clear from the testimony as we view it, that the plaintiff did not voluntarily run his car over this dangerous track. He did it upon the order of the superintendent of the department in which he was working, the vice-principal of the defendant, and the jury was the proper tribunal to say whether he had a right by that order to infer that the superintendent thought he could safely pass over the tracks, and if that inference was justifiable, to also say that the plaintiff, as employee, trusted to the judgment of his superior. If that were the case, then the true rule would be that laid down by Mr.

Justice Mestrezat in Willimas *vs.* Clarke, 204 Pa. 416, which we gave to the jury for their guidance and which reads as follows: 'We think the facts in this case bring it within the well recognized rules laid down in the test books and in our own decisions. The true rule in this case, as in all other cases, is that if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous.' "

It will be noticed that the facts in our case are strikingly similar to Glew *vs.* Pittsburgh Railways Company, *supra*, as appears from the following extract of testimony:

By Mr. Pritchard:

"Q. Why were you afraid?

A. I saw that stone was a large one, and I was afraid to put my arm under it.

Q. What were you afraid of?

A. I was afraid to put the piece of iron under.

Q. What were you afraid woud happen?

A. The rock was like to fall on my arm.

Q. Did you tell Humphrey Davis you wanted to go after something to shove under it'?

A. Yes, I told him, and he told me, 'Go ahead and put under the stile; put under the stile.'

Q. Just give the words that you used as near as you can recollect them.

A. Get him something to pút in the stile.

Q. Please repeat, as near as possible, just what you said to Humphrey Davis. Use the words as nearly as you can recollect them.

A. That is all Humphrey Davis said, 'Go ahead, go ahead.'

By the Court:

Q. Mr. Pritchard is asking you now what you said to Humphrey Davis, your exact words.

A. Get something for to put in the stile, on the block.

By Mr. Pritchard:

Q. What had you usually used before to put the wedge under?

A. I was using sometimes a hook and also the shovel." (Transcript of Record, pages 23–24).

The Superior Court of the State of Pennsylvania, in the case of Franczak *vs.* Nazareth Cement Company, 42 Pa. Super Ct. 263, laid down the same rule where a workman was hurriedly attempting to cross a track to avoid an approaching car and was directed by the foreman to stop and remove a stone on the track, with the assurance from the foreman that there was plenty of time for him to do so and get away, but while performing the work directed by the foreman he was injured, and it was held that:

> "A servant is not required to act on his own judgment against that of his employer, and if the latter give him positive instructions to go on with a particular task, he may recover for any injury received if the work is not imminently dangerous."

A case presenting almost similar facts is the case of Moleskey *vs.* South Fork Coal Mining Co., 247 Pa. 434, which was a case where an employee in a mine complained to the superintendent of the danger from a threatened fall of rock forming part of the roof of the mine heading, and that the latter, after testing the roof with a pick, assured the plaintiff that it was safe and instructed him to proceed with the work. The Court was asked to hold as a matter of law that because the plaintiff knew of the threatened danger and had complained of it to the mine superintendent, that he was gulity of contributory negligence and the Court should so instruct the jury as a matter of law. The Court submitted the question to the jury, and on an appeal the Supreme Court, in an opinion by Mr. Justice Elkins, said:

> "A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may under some circumstances rely upon their advice and still more upon their orders, notwithstanding misgivings of his own."

Mr. Justice Elkins further, in commenting upon the elements which must be considered by the jury when he is acting under the express instructions of the foreman stated as follows:

> "Even the rule as thus stated is subject to the qualification that the servant is not warranted in

proceeding with his work, if it was inevitably and immediately dangerous to do so, but what tribunal shall determine whether the work was inevitably and imminently dangerous? This necessarily depends upon the facts. It is sometimes for the Court and sometimes for the jury. In the present case, plaintiff had misgivings about the falling of the rock from the roof of the heading, but he was not sure about it, and sent for the superintendent for the purpose of calling his attention to what he apprehended might be an impending danger. When the superintendent assured him that the rock would not fall and ordered him to proceed with the work he obeyed his instructions. Was he justified as a man of common prudence in acting upon the judgment of the superintendent under these circumstances? Was the danger so obvious and imminent as to make it his duty to refuse to continue work when directed to proceed by the superintendent? Appellant argues that appellee admitted on the witness stand that he knew the danger was imminent and by his own admission is precluded from recovering damages in this action. But in this connection we must consider all of his testimony, in order to understand what he meant by the word 'imminent,' which was used by counsel in asking the question and not by the witness in answering it. The explanation of the witness was that while he had misgivings about the safety of the overhanging rock, he concluded after the superintendent sounded the same with his pick and assured him it would not fall it was safe for him to continue work. That this was a truthful statement was shown by the fact that he did continue to perform the work he was directed to do. He did not know that the rock would fall, and perhaps no one,

not even the superintendent, could have determined definitely in advance what would happen, Under all the circumstances of this case we cannot declare as a matter of law that plaintiff was so clearly guilty of contributory negligence as to preclude a recovery. This was a question for the jury and it was so submitted in a careful and painstaking charge by the learned trial Judge. Ample authority for this position will be found in the following cases: Patterson *vs.* Railroad Co., 76 Pa. 389; Williams *vs.* Clarke, 204 Pa. 416; Glew *vs.* Railways Co., 234 Pa. 238; Collins *vs.* Coal Co., 241 Pa. 55."

We, therefore, respectfully submit that not only did the Circuit Court of Appeals err in affirming the opinion of the Court below as to the instructions given, but also erred in sustaining the giving of instructions by a trial Judge not in open court, not in the presence of counsel, nor with the consent of counsel or their clients. It will once for all subject the jury to an influence which the people as a whole thought could not exist, that is, the giving of secret instructions when neither they nor their counsel are present so that they can hear what is said to the jury, and it once for all destroys the tradition that a trial is to be held in open court from beginning to end. A litigant who has lost his case, when the trial Judge himself confessed in the opinion on the motion for a new trial "That the practice here adopted does not deserve encouragement," and this criticism is followed by the opinion of the Circuit Court of Appeals upholding the act of the trial Judge in as doubtful language as this: "We do not say that harm could never happen in the exchange of such a question and answer; the variety and complexity of human affairs are so great that the same act may have a different quality if the atmosphere be different

that surrounds it; but so far as we can see, harm is not probable. We agree fully that modifications of established practice should be allowed with caution, and we see excellent reasons why every step in a trial up to the rendering of the verdict should be taken in open court, and (wherever practicable) in the presence of counsel also." We are at a loss to understand just what is meant by the learned ~~trial~~ judge's distinction by saying that the "same act may have a different quality if the atmosphere be different that surrounds it." We assume and have been taught to assume that the atmosphere surrounding a court of justice is the same in Maine as in California, and should be the same in Pennsylvania. And if this practice is dangerous in some atmospheres in a court of justice, it might even become dangerous in the State of Pennsylvania.

Respectfully submitted,

J. WILLARD PAFF,
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Attorneys for Plaintiff-in-Error.

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Supreme Court of the United States

DONATTO FILLIPPON,
Petitioner,
against
ALBION VEIN SLATE COMPANY,
Respondent.

No. 241
October Term,
1917.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to Review a Decree or Judgment of that Court Affirming the Judgment of the District Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES.

Donatto Fillippon,
Petitioner,
against
Albion Vein Slate Co.,
Respondent.

No. 622 October Term, 1917.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree or judgment of that Court affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR PETITIONER.

Statement of the Case

This cause is brought here upon a writ of certiorari issued by this Court to the United States Circuit Court of Appeals for the Third Circuit on the 18th day of October, A. D., 1917 (Trans. p. 50). The action was commenced on the 10th day of May, 1915, by Donatto Fillippon, a citizen of the Kingdom of Italy and a subject of the King of Italy. The cause of action was trespass to recover damages for personal injuries which the plaintiff suffered due to the defendant's negligence in the course of plaintiff's employment. The defendant was a Pennsylvania corporation doing business at Pen Argyl in the County of Northampton and State of Pennsylvania. The accident happened on the 31st day of July, A. D., 1914, and while the plaintiff was engaged in the duties of his employment at the defendant's slate quarry. (Trans. p. 9). The specific negligence alleged was the failure of the defendant company to furnish a reasonably safe place to work; failure to warn and instruct the employee as to the

defects in methods and machinery; failure to provide methods, appliances and machinery which were in common and ordinary use by others in the same line of business, and that the plaintiff was injured while acting under the direct orders and instructions of his foreman by yielding his own judgment to the superior judgment of the defendant to whose orders and directions the plaintiff was bound to yield (Trans. p. 3-4).

No answer was filed by the defendant. The plea of "Not guilty" was filed by the defendant on April 19, 1916.

The case was tried in the District Court of the United States for the Eastern District of Pennsylvania at Philadelphia before District Judge Witmer of the Middle District of Pennsylvania (specially presiding) and a jury, on the 9th day of October, 1916. The Court delivered the charge to the jury to which the plaintiff did not except, but the defendant excepted to so much of the Court's charge as related to the plaintiff's contention that the plaintiff could not be held guilty of contributory negligence when he was acting under the immediate instructions of his foreman and yielded to such instructions contrary to his best judgment and when the danger threatening was not imminent or inevitable. (Trans. p. 38-39). After noting defendant's exception, the case was submitted to the jury, whereupon the jury retired to the jury room in charge of a tipstaff or bailiff. After the presiding Judge retired to his Chambers, another District Court Judge started the trial of a case in the court room where this case was tried. After deliberating some time, one of the jurymen wrote a note and handed same to the tipstaff or bailiff in charge guarding the jury room to be conveyed to the trial judge, and without calling the jury into open court for further instructions and without notifying the parties or counsel in the case, (who were present in Court at the time) wrote an answer in reply to the written question thus com-

municated to the trial judge and pursuant to said reply the jury returned a verdict in favor of the defendant. (Trans. p. 39). The counsel for plaintiff were not advised of what the Court had done until one of the members of the jury complained about the instructions sent to the jury room. An investigation developed that the question and answer in the communications between the court and jury were both preserved and in the hands of the Clerk of the Court. Immediately a motion was filed for a new trial assigning among other reasons the secret instructions and communication between the court and jury after the jury had retired to deliberate without calling the jury into open court and without informing the parties or their counsel, and that the Court erred in the substance of the instructions thus communicated to the jury. At the time of the argument of the motion for a new trial, an exception was noted upon the request of the plaintiff to the substance as well as the manner and form in which the instructions to the jury were given by the trial judge by answering a communication from the jury not in open court and without notice to counsel who were present in Court at the time. (Trans. p. 40-41). The District Court refused the motion for a new trial and judgment was entered on the verdict December 21, 1916, (Trans. p. 42-43).

On January 18, 1917, the plaintiff filed his petition for a writ of error from the judgment and assigned for error;

(1) The communication of instructions by the Court in Chambers to the jury after the jury had retired to deliberate in the absence of counsel and the plaintiff, and not in open court.

(2) The substance of the instruction.

(3) The manner of privately communicating with the

jury by the Trial Judge not in open court and in the absence of plaintiff and his counsel. (Trans. p. 44).

The questions thus raised by the assignments of error were argued before the Circuit Court of Appeals for the Third Circuit on the 16th day of March, A. D., 1917, and on the 17th day of May, 1917, the Circuit Court of Appeals in an opinion by McPherson, C. J., handed down an opinion affirming the judgment of the court below, (Trans. p. 46-48). A petition for a writ of certiorari was presented in the Supreme Court of the United States on the first Monday of October, 1917, after complying with all the requisites necessary for such presentation, which petition was allowed on the 18th day of October, 1917.

THE FACTS IN THE CASE

On the day of the accident, July 31, 1914, Donatto Fillippon was employed by the Albion Vein Slate Company, the defendant, as a rubbish hand in its slate quarry near the town of Pen Argyl, Northampton County, Pa., and had been employed in this capacity for about one year and three months. His foreman was Humphrey Davis, (Trans. p. 9). The foreman and his son were working about three or four feet from where Fillippon was loading rubbish into a rubbish box. Humphrey Davis and his son were trying to lift a block of slate about five feet long, four feet wide and six or seven inches thick by means of a crow-bar as a lever preparatory to adjusting a chain around the block so that it could be fastened to the cable to draw same out of the quarry. Humphrey Davis asked the plaintiff to insert a stile or wedge, made out of a piece of railroad iron, under the block while he and his son were raising the block. Fillippon pushed the stile or wedge about six inches under the block and then he told the foreman that he was afraid to put his arm further under the block and started to get a shovel handle or a stick, which had been formerly used for this pur-

pose, to push it under the block so that if the block would tilt it would not injure him. Humphrey Davis told him to go ahead and put the stile under with his hand, (Trans. p. 11). Fillippon demurred again and said that he wanted to get something; that he was afraid to put his hand under the block, but Davis told him to go ahead and put the stile under the block with his hand, (Trans. p. 15). Fillippon obeyed his foreman, put the stile under with his arm, the stone tilted and crushed his arm so that the arm had to be amputated about three or four inches below the armpit. There was no imminent or certain danger from using the arm to push the stile under the block. There was only danger at times, depending upon the support of the block, (Trans. p. 24). Humphrey Davis admitted that he told him to put this wedge under the stone but he did not recall whether or not he said that he was afraid to put it in with his hand, (Trans. p. 21). William Davis, the son of Humphrey Davis, who was present at the time of the accident, testified that he heard his father tell Fillippon to put the stile under the block, but he does not remember that he told him to put his hand in, (Trans. p. 28-29). The testimony showed that on former occasions a stick or the handle of a shovel was used to push the stile in. The customary method to put the stile or wedge under the blocks was a long pole with a hook on the end or the handle of a shovel. (Trans. p. 16).

Alexander McKenna, who was Superintendent of the Albion Vein Slate Company from 1912 to 1916, and therefore Superintendent at the time of the accident, in testifying as to the method in common and ordinary use by others in the same line of business, stated that the workmen were not to use their hand at any time in pushing the stile or wedge under blocks, and further testified that he made it a point to instruct the labor hands and all men to be careful not to use their hands. (Trans. p. 19-20). The rate of wages of Fillippon at the time of the accident was One dollar and eighty

cents a day and his expectancy of life according to the mortality tables was 40.75 years. (Trans. p. 18).

Facts concerning communication by the Court and Jury not in open court and in the absence ofcounsel.

After the case was submitted to the jury the Trial Judge retired from the court room into Chambers and another judge occupied the court room for the trial of a case. The jury had deliberated for some time when some member of the jury sent by the bailiff or tipstaff to the Court in Chambers the following question:

> "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by Foreman Davis to 'push it under'." (Trans. p. 39).

The Court, without calling the jury into open court and without notifying counsel for plaintiff who were present in court at the time and waiting for the return of the jury, wrote, in his Chambers, the following answer which he sent to the jury room with the tipstaff or bailiff:

> "If he was told to put it under as stated by the plaintiff and he did so, fully appreciating at the time the danger attending, and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence." (Trans. p. 39).

Both the manner of conveying these instructions and the

substance of these instructions were made the basis of a motion for a new trial. When the motion for the new trial came up for argument before the Trial Judge an exception was allowed by the Court to the plaintiff both as to the manner or method in which the instructions were conveyed and as to the substance of the instructions. (Trans. p. 39-41).

LEGAL ARGUMENT.

There are two questions in this case and either one is controlling. They are as follows:

1. Did the Trial Judge err in giving written instructions to the jury after the jury had retired to deliberate not in open court nor in the presence of the parties or their counsel and given without their consent or knowledge?

2. Were the instructions erroneous?

FIRST POINT

1. The Court erred in communicating with the jury by giving further instructions not in open court without notifying the parties or their counsel present.

These two legal questions above stated formed the basis of the application for a new trial in the District Court below and also the basis for the assignments of error on the appeal from the judgment of the District Court to the Circuit Court of Appeals and we respectfully submit that the Circuit Court of Appeals erred in affirming the judgment of the lower Court on the legal questions thus raised and involved.

It is with reference to the former question that the District Court of the Eastern District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit in affirming the District Court, differ in their opinions from the decisions

of the Circuit Court of Appeals of the Sixth Circuit and the Circuit Court of Appeals of the Eighth Circuit, as well as the doctrine of the Supreme Court on the same subject, and also differ and are in conflict with the decisions of the Supreme Court of Pennsylvania which is the highest appellate court in the State of Pennsylvania, as well as the decisions of nearly every other appellate state court of the whole United States. The Circuit Court, by Judge McPherson, of the Third Circuit in the opinion on the question of whether it was error for the trial judge to give written instructions in answer to a request from the jury not in open court and not in the presence of, nor with the knowledge of counsel then present in open court, states as follows:

> "Upon this subject the federal courts have not yet passed, as far as we know, but numerous cases have arisen in the state courts and have resulted in two divergent lines of decision. The authorities are collected in a note to North Dakota vs. Murphy, 17 L. R. A. (N. S.) 609 (1909), and we see no need to add a prolonged discussion to the 50 or more opinions already in the books. Numerically, the opposing cases are fairly equal, and in weight of argument also there is little to choose between them."

A. CONFLICT OF THIS DECISION WITH OTHER FEDERAL DECISIONS.

We respectfully submit that the learned Circuit Judge who wrote the opinion evidently overlooked certain portions of the brief for the plaintiff-in-error submitted at the time of the argument of the case before the Circuit Court of Appeals for the Third Circuit, because special attention was called in the brief to the decision of the Circuit Court of Appeals for the Sixth Circuit in Yates vs. Whyel Coke Company, 221 Federal Reporter, 603, as well as the opinion of the Circuit Court of Appeals for the Eighth Circuit in Aerheart vs. St. Louis I. M. & S. Ry. Co. 99 Federal 907, as well

as the opinion of Mr. Justice Gray in Stewart vs. Wyoming Ranch Co., 128 U. S. 383 (32 L. Ed. 439) and the printed brief submitted at the time of the argument contained copious extracts from the opinions on this very question. The learned Circuit Judge who wrote the opinion of the Circuit Court of Appeals for the Third Circuit also evidently forgot during the time that intervened between the time of the argument and the time of writing the opinion that a special effort was made to bring the decisions in the above cases to the attention of the court at the argument. When the learned judge of the Circuit Court of Appeals further refers to the numerical equality of the two lines of cases as given in the foot-note of North Dakota vs. Murphy, 17 L. R. A. (N. S.) 609, we also must differ as to any numerical equality existing or anything near a numerical equality. We concede that the decisions of the state courts of the State of New Hampshire and Virginia are at variance with all the rest but we will not concede that there is anything like any equality numerically. Not that we are contending that your Honorable Court or any other appellate court should erect for themselves scales and throw all the decisions into one side or the other of the scale and thereby decide which line of cases to follow, because it is a question of reasoning and justice that we are trying to present and impress on this court and not a question of arithmetic.

The only case that we have been able to find in which the question was raised before the Supreme Court of the United States was the case of Stewart vs. the Wyoming Ranch Co., 128 U. S. 383, (32 L. Ed. 439), where in an opinion by Mr. Justice Gray the question is referred to as follows:

> "The remaining objection argued is to an instruction given by the judge to the jury in response to a question asked by them upon coming into court after they had retired to consider their verdict. It is a conclusive answer to this objection, that no exception was taken to this instruction at the time it was given,

> or before the verdict was returned. The fact that neither of the counsel was then present affords no excuse. Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions. The absence of counsel, while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

It will be noted that in this particular case the instructions were given in open court. Counsel were not present at the time the instructions were given, but particular attention is called to the fact that the language of the learned Judge limits the power and duty of the trial judge to instruct the jury in "open court."

The question was flatly raised before the Circuit Court of Appeals for the Eighth Circuit in the case of Aerheart vs. St. Louis I. M. & S. Ry. Co., 99 Federal Reporter 907. The Circuit Judges who heard the case were Caldwell, Sanborn and Thayer, and in the opinion by Circuit Judge Thayer, we have the following:

> "The practice of sending written instructions to the jury room, or holding other written communication with the jury, after they have retired to consider their verdict, without the knowledge of counsel for the respective parties, has been condemned in numerous well considered cases and has only been upheld in a few instances. Chouteau vs. Iron Works, 94 Mo. 388, 7 S. W. 467; State vs. Patterson, 45 Vt. 308; Bank vs. Mix, 51 N. Y. 558; O'Connor vs. Guthrie, 11 Iowa, 80; Campbell vs. Beckett, 8 Ohio St. 210; Hoberg vs. State, 3 Minn. 262 (Gil. 181). See contra Bassett vs. Manufacturing Co., 28 N. H. 457; Goldsmith vs.

> Solomons, 2 Strob. 296. It will accordingly be conceded that such practice is erroneous, and ought not to be sanctioned."

Circuit Judge McPherson who wrote the opinion in the case under consideration stated that "numerically the opposing cases are fairly equal." Circuit Judge Thayer on the same question said "the practice . . . . . has been condemned in numerous well considered cases and has been upheld in a few instances." Our investigation of the cases confirms Judge Thayer. There are cases where counsel consented or where the communication did not amount to instructions which differ from the universal trend.

The question was recently raised in the case of Yates vs. Wheyl Coke Company, 221 Federal Reporter 603, before the Circuit Court of Appeals for the Sixth Circuit, (Judge Knappen, Denison and Sater) where in an opinion by District Judge Sater, sitting as the Court of Appeals for the Sixth Circuit, it was held:

> "A trial court should avoid instructing a jury in the absence of counsel for the respective parties, when it can conveniently do so, and especially where the supplemental charge covers propositions of law not dealt with by the original charge; but the rule which controls is thus stated by Mr. Justice Gray in Stewart vs. Wyoming Ranch Co., 128 U. S. 383, 390, 9 Sup. Ct. 101, 104 (32 L. Ed. 439); the absence of counsel while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

It will be noted that in the latter case, as well as in the case of Stewart vs. Ranch Company, supra, the instructions

were given in open court, but not in the presence of counsel and while it was held that this was not error, the power and duty of the judge to instruct the jury is limited entirely to the **open court** and is not extended either by Mr. Justice Gray or by District Judge Sater to the jury room by written communication, and it is conceded by Circuit Judge Thayer that it is erroneous to give such instructions.

B. CONFLICT OF THIS DECISION WITH DECISIONS OF HIGHEST APPELLATE COURTS OF PENNSYLVANIA.

We will next pass to the conflict between the decision of the Circuit Court of Appeals for the Third Circuit as enunciated by Circuit Judge McPherson and the Supreme Court of the State of Pennsylvania, and will then pass to the various cases decided by the highest courts of appeal of other states.

The question of private communications, not in open court, by the Court to the jury in the line of further instruction seems to have been brought to the attention of the Appellate Court of Pennsylvania for the first time in Earon vs. Mackey, 106 Pa. 452, and in this very case, the distinction which the District Court makes in the opinion refusing a new trial is shattered at once. In Earon vs. Mackey, supra, the question which the jury asked and the instructions which the Court gave were preserved, but unfortunately there was no bill of exceptions to the action of the Court. The Supreme Court of Pennsylvania condemned the practice, and stated its position with reference to a communication not made in open court as follows:

> "It is irregular and erroneous for the Court to send instructions to a jury during their deliberations and in answer to their request for information, the jury

being in their room and not in the presence of the Court."

And Mr. Justice Sterrett, with reference to this question, states as follows, in the opinion on page 457:

> "There is nothing in the record on which to base the second specification of error. The depositions taken on the motion for a new trial are no part of the record. It does appear, however, in a note appended by the learned Judge to his charge that after being out all night the jury, in a paper signed by their foreman, asked a question, which was answered by the Court in the affirmative, but he does not say the answer was conveyed by tipstave. If it was so communicated to the jury not then in the presence of the Court, the proceeding was irregular and erroneous, but we can take no notice of any fact or circumstance that occurs during the deliberation of the jury unless it is regularly brought to our attention by bill of exceptions."

We respectfully submit that according to the large preponderance of authorities, the error and impropriety lies in the bare communication of instructions, not in open court. That this is so is plainly apparent from the syllabi in Sommer vs. Huber, 183 Pa. 162, where it was held as follows:

> "Instructions to the jury must be given in open court, where they may be heard by the parties and their counsel."

> "It is error for the trial Judge, in the absence of the parties and their counsel, to send written instructions to the jury after they have retired, although sent in answer to a written request from the jury for instructions."

Nor according to the decision in the above case is the error dependent on any distinction between oral and written

instructions as was attempted to be argued by the defendant in the Circuit Court of Appeals.

The case of Sommer vs. Huber, supra, was reversed solely on the specific ground that it constituted error, and from the extract of the arguments of counsel published with the report of the case, it would appear that appellee's counsel urged the same argument which the Court below adopted as its reason for justifying the communication, but in spite of this, the Supreme Court reversed on the ground (as stated by the Court) "of an unwarranted departure from the rule which condemns secret instructions to the jury in relation to questions raised by the pleadings or the evidence as opposed to the proper administration of justice."

The question was again raised in Pennsylvania in Commonwealth vs. House, 6 Pa. Super. Ct. 92, where the Superior Court of Pennsylvania in an opinion by President Judge Rice reviews the authorities as follows:

> "Unquestionably the Court has discretionary power, of its own motion, to recall the jury and give them further instructions, or withdraw or correct erroneous instructions. As far as we are informed, the usage of the courts of the Commonwealth has been to give such additional instructions only in open court, and this is the safer and the better practice. At all events, this much is established by the overwhelming weight of authority, that it is reversible error to give them after the adjournment of court in the absence and without the knowledge of the parties or their counsel; McNeil vs. State, 47 Ala. 498; Collins vs. State, 33 Ala. 434; Wade vs. State, 12 Ga. 25; Fisher vs. People, 23 Ill., 283; Crabtree vs. Hagenbaugh, 23 Ill. 349; Fish vs. Smith, 12 Ind. 563; O'Connor vs. Guthrie, 11 Iowa, 80; Sargent vs. Roberts, 18 Mass. 337; Merrill vs. Nary, 92 Mass. 416; Read vs. Cambridge, 124 Mass. 567; Benson vs. Clark, 1 Cow. 258; Moody vs. Pomeroy, 4 Den. 115; Taylor vs. Betaford,

13 Johns. 487; Bank vs. Mix, 51 N. Y. 558; People vs. Maurer, 43 N. Y. 1; Hoberg vs. State, 3 Minn. 262; Kirk vs. State, 14 Ohio, 511; State vs. Patterson, 45 Vt. 308.

"Against this weight of authority (quoting from the opinion of Mr. Justice Gray in Read vs. Cambridge, supra), the only cases brought to our notice which countenance a different rule are two in New Hampshire and one in South Carolina, and in the latter the point adjudged related only to instructions as to the form of the verdict given by the Judge to the foreman in open court; and the criticism upon the judgment of this court in Sargent vs. Roberts (18 Mass. 337) was based upon the singular theory that the intercourse between the jury and the Bench is so confidential that often communications from the jury ought not to be disclosed to the bar."

We must again advert to the difference between Circuit Judge McPherson's statement in the opinion that "the opposing cases are fairly equal" and the statement of President Judge Rice of the Pennsylvania Superior Court that "by the overwhelming weight of authority it is reversible error to give them (instructions) after the adjournment of court in the absence and without the knowledge of the parties or their counsel."

The judgment in Com. vs. House, supra, was also reversed, and it may be added that the written question and the written instruction to the jury were known and made a part of the record.

C. CONFLICT WITH DECISIONS ON HIGHEST APPELLATE COURTS OF OTHER STATES.

The universal rule adopted by the appellate courts of New York is that any communications, whether material or not, prejudicial or not, nullified the verdict if not made in open court without the consent of the parties or their counsel, and

while it is a fact that there is one case, Thayer vs. VanLeet, 5 Johns. 111, to the contrary, this case was overruled subsequently in Taylor vs. Betaford, 13 Johns. 487; Moody vs. Pomeroy, 4 Denio. 115; Watertown Bank vs. Mix, 51 N. Y. 558, and Neil vs. Abel, 24 Wend. 185.

In Crabtree vs. Hagenbaugh, 23 Ill. 349, sc. 76 Am. Dec. 694, it was held by the Supreme Court of Illinois that the policy of the law requires that all proceedings should be open and notorious, and that the losing party should not be obliged to go the inconvenience of offering proof that even an error had been committed.

In Danes vs. Pearson, 6 Ind. App. 465, 33 N. E. 976, it was held by the Appellate Court of Indiana that a communication between the Court and the jury is improper and nullifies the verdict, even though the communication is harmless in itself.

In the case of Sargent vs. Roberts, 1 Pickering 337, which is considered the leading case on this subject, the Appellate Court admits that the practice of the trial judge communicating with the jury not in open court and without the presence of the parties, was so long established that nobody questioned its impropriety and was a practice which he had indulged in often himself, but proceeded to denounce and condemn the practice and reversed the judgment, and in doing so said it should no longer continue. It might also be added that the communication in that case was preserved so it could be known exactly what was communicated.

In Meier vs. Morgan, 82 Wis. 289, 52 N. W. 174, the highest Appellate Court of Wisconsin held as follows:

> "But whether counsel be present or not, if the jury are to be further instructed, they should be brought into open court. The rule is strict, but salutary. All court proceedings should be in the open. . . . .

> Nor should a defeated party be required to show that such a communication as here had was in fact prejudicial. He is in fact entitled to have his case tried in open court from start to finish. There is safety from no other rule."

In the case of Cook vs. Green, 6 N. J. L. 109, the Judge called upon the attorneys to go with him to the jury room for the purpose of giving further instructions, in answer to a request from the jury. The counsel refused, and the Appellate Court held that the giving of such further instruction was not error, because he did not do it secretly, nor did he hold private conferences with the jury, and that if he had not notified the parties or their counsel, then it would have been such an outrage upon the essential forms of the trial as to vitiate the proceedings.

In Chicago, etc., vs. Robbins, 43 N. E. 332, the request of the jury and the answer of the judge were preserved, but the Appellate Court of Illinois held:

> "The more important and serious matter, however, is that the jury were not brought into open court."

In O'Connor vs. Guthrie, 11 Iowa, 80, the Judge, in answer to an inquiry in writing from the jury, in the same manner, sent by the bailiff, an instruction material to the determination of the case, and this was done without the knowledge of either party. The Court reversed the judgment and held that further instructions given to the jury had to be given in public and in open court, so that an opportunity may be afforded the parties to know what instructions were given and ask for such other explanation of the instructions as may be deemed necessary.

In Low vs. Freeman, 117 Ind. 341, sc. 20 N. E. 242, there

were questions propounded by the jury to the Judge after retiring and the Court wrote on the communication from the jury and returned it to them, and while the instruction was proper, the Appellate Court held in reversing the judgment that it should have been given by calling the jury into open court.

In Greely vs. Weaver, 5 Atl. 267, the Appellate Court of Maine held that the Court has no right to send an answer to the jury to a question propounded to him in writing by the jurors after they have retired to deliberate on their verdict, without the consent of counsel.

In Hopkins vs. Bishop, 91 Mich. 328, sc. 51 N. W. 902, it was held by the Appellate Court of Michigan that it was error for the trial court to send additional instructions to the jury room in response to a written request from the jury without the knowledge of the parties litigant and without giving them an opportunity of being heard.

In Chouteau vs. Jupiter Iron Works, 94 Mo. 388, sc. 7 S. W. 467, the Appellate Court of Missouri held that all instructions should be read to the jury and in open court, and where after retiring, the jury desires further instructions on the law of the case it should be brought into court to receive such further instruction, and if in answer to a request further instructions are sent to the jury by the bailiff in charge, the records should show the consent of the parties to this procedure.

The Court in this case particularly calls attention, like President Judge Rice, in the case of Commonwealth vs. House, supra, to the fact that the courts of New Hampshire and South Carolina hold to a different rule and are the exceptions.

Is it not singular that the trial court, in order to justify its action in giving private instructions to the jury not in open court, and upon which the trial judge bases his opinion for the refusal of a new trial, resorts to a New Hampshire case and also a case in 20 Missouri Appeal Reports, the decision in which case must have long preceded the leading case of Chouteau vs. Jupiter Iron Works, supra, which is found in 94 Missouri, 388, and which decides such action in the trial court to be erroneous?

In the case of Martin vs. Martin, 76 Nebr. 335, sc. 107 N. W. 580, the Appellate Court of the State of Nebraska held that it was error for the Court, after the jury had retired, to return an answer to a written communication from them without bringing them into court.

In the case of Moseley vs. Washburn, 165 Mass. 417, which is the only case that seems to differ from the universal trend of opinion in that State, the reason stated for the deviation from the general rule is that the only communication sent to the jury was with reference to the computation of interest and the Appellate Court held that since the interest was a mere matter of mathematical computation which the Court could direct the jury to calculate after they had returned a verdict in favor of the plainti without calculating the interest, therefore, the error was of such a nature as would not be held to vitiate the verdict.

In the case of Texas Midland Railroad vs. Byrd, 115 S. W. 1163, the Texas Supreme Court held that it is reversible error for the judge to communicate with the jury otherwise than as provided by law, as by holding conferences with the foreman not in open court and in the opinion by Chief Justice Gaines, a number of cases are cited for the proposition set forth in the syllabus hereinbefore stated.

All the authorities, both for and against the proposition, are collected in the note of State vs. Murphy, 17 L. R. A. (N. S.) 609, from which it will appear that the exceptions are the cases cited by the learned court below as a basis for refusing a new trial and we respectfully submit that no matter what the practice may be in New Hampshire and South Carolina and in an isolated case in Virginia and Missouri, it seems that the Federal Courts of this County have recognized the same principle which we are contending for, to-wit: that any additional instructions given to the jury after the jury have started to deliberate must be in open court and even though they can be given without the presence of the parties or their counsel, the failure to give such instruction in open court admits of no exception. All cases collected in the note under State vs. Murphy, supra, holding communications between court and jury, not in open court, proper and not reversible error can be distinguished except decisions of the appellate court of New Hampshire—here the rule laid down in Sargent vs. Roberts, supra, and kindred cases is expressly overruled.

SECOND POINT

2. Were the instructions erroneous?

The question raised as to the correctness of the instructions communicated in the manner aforesaid to the jury not in open court forms the second assignment of error. The substance of the instruction conveyed to the jury not in open court was in conflict with the rule laid down by the Supreme Court of Pennsylvania in cases of this kind. The instructions thus in conflict with the doctrine laid down by the highest appellate court of the state in which it was tried, was subsequently affirmed by the Circuit Court of Appeals for the Third Circuit, thereby constituting a conflict in the

law laid down by the Federal Courts and the highest state courts in the State, in which the action arose and was tried pertaining to negligence and contributory negligence as enunciated by the Supreme Court of Pennsylvania when an employee is working under the direct eye and instruction of the master and obeys the orders and instructions of the master after voicing his doubt as to the propriety of the orders and the imminence of the danger to be encountered by following his master's instructions. The question that was the jury for decision. That this is so was clearly held in 29 Cyc. 640, where the general rule is laid down as follows:

> "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand and having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by foreman Davis to 'push it under' ".

We feel safe in saying that the answer to this question in any state in this Union would have been "No," because the facts as embodied in the question would not make the employee guilty of contributory negligence as a matter of law, but it was one of the questions that had to be submitted to the jury for decision. That this is so clearly held in 29 Cyc. 640, where the general rule is laid down as follows:

> "The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law but the question should be submitted to the jury."

The court invaded the province of the jury by answering as a question of law that which was a question of fact for the jury to determine.

Instead, however, of answering this question in the only way in which it could be answered as presented, the court

adds elements, qualifications and conditions and by adding those qualifications, elements and conditions the trial court felt enabled to answer the question in the affirmative instead of the negative and in this we say the injury to the plaintiff consisted. We respectfully submit that if this instruction had been given in open court in the presence of counsel, the attention of the court could have been called to the misleading instructions embodied in the answer, and the plaintiff could have requested the court to charge on this point in the language and according to the authorities of the State of Pennsylvania.

An analysis of the answer creates just a suspicion that it was framed with a desire to answer in the affirmative, otherwise it would have been very simple for the court to say that knowledge of the danger in itself when ordered by the foreman to pursue a dangerous task did not constitute contributory negligence as a matter of law, but was a question for the jury under all the facts. But the learned trial judge starts out in his answer, "If he was told to push it under, as stated by the plaintiff, and he did so." There is not much question that this was done, and in fact, this was assumed in the question sent by the jury. The learned trial judge continues further and states "fully appreciating at the time the danger attending." That much also was assumed in the question, and, therefore, did not require any repetition. The learned trial judge then continues, "and having sufficient time to consider." It is hard to understand what difference it would make if a man had sufficient time to consider if he already appreciated the danger. It cannot be assumed that he could get any enjoyment out of musing and meditating upon a danger with which he was already fully acquainted and sufficient time to consider the danger would hardly change the liability of either the employer or employee if he had a week to consider upon a risk or a danger with which he was already fully conversant. The learned trial judge further

says that "when he was face to face with the situation, that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the danger known to him and apparent, he is guilty of contributory negligence." By this instruction the trial judge did not submit the question which the courts of Pennsylvania said should be submitted to the jury to determine whether the employee was guilty of contributory negligence, to-wit: the imminence and certainty of injury, but decided as a question of law, the question of fact which the jury was to decide. The jury disagreed on the very question of fact which it was their province to decide, and an ingenious juryman conceived the idea of having the judge decide the question of fact for them. This the judge did in his answer to the question submitted. Did, or did not, the litigant suffer from the action of the court when promptly a verdict was returned according to the judge's decision? The Supreme Court of the State of Pennsylvania, however, has said that even though the employee was fully aware of the danger threatening and if the risk or danger did not threaten imminent or immediate injury, so that a following of the employer's instructions would not mean certain injury, that then if the employee overruled his better judgment and followed the instructions of his superior and injury followed, that he could not be held guilty of contributory negligence as a matter of law. It was for the jury to decide under all the circumstances whether the danger impending was so imminently and inevitably threatening that a reasonably prudent man should have known that an obedience to orders would be followed by certain injury. The following recent cases, decided by the Supreme Court of Pennsylvania, the highest appellate court in the state, clearly show that the instructions as given by the trial judge were erroneous, and that the instructions given by the Court invaded the province of the jury who are the sole judges of the facts and

that upon the assumed facts submitted to the judge, the answer was erroneous.

The rule was clearly laid down by the Supreme Court of the State of Pennsylvania in Glew vs. Pittsburgh Railways Company, 234 Pa. 238, where Glew, a motorman in the employ of the defendant company, was engaged to run a freight car whenever and wherever directed by the superintendent of the defendant's supply department; that on the day of the accident he was instructed to run his car with a load of old wheels on board, and pulling a gondola car loaded with coal behind, over a certain line, the tracks of which were out of repair; that the plaintiff suggested this fact to the superintendent, or his representative, and said that it was dangerous to run the kind of load that he was hauling over these tracks, when he was told that he should proceed to do as he was ordered or he "would learn what would happen to him"; that he carried out the directions of the superintendent, and while on the line the tracks separated, causing the gondola car to drop down and break an axle, with a resulting shock to the freight motor car which displaced the old car wheels and caused one of them to fall upon and injure the plaintiff. The plaintiff admitted on cross-examination that he knew that the tracks were in a dangerous condition; that he protested against running his cars loaded as they were on those tracks, but stated that the superintendent, or his representative, insisted on him doing what he did. On page 242 of the opinion, which was adopted by the Supreme Court, the Court expressly held as follows:

> "It struck us at the trial, and does yet, that the Court would have erred had it said as a matter of law that the plaintiff was guilty of contributory negligence.

"The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law, but the question should be submitted to the jury. 29 Cyc. 640".

"Again, it is clear from the testimony as we view it, that the plaintiff did not voluntarily run his car over this dangerous track. He did it upon the order of the superintendent of the department in which he was working, the vice-principal of the defendant, and the jury was the proper tribunal to say whether he had a right by that order to infer that the superintendent thought he could safely pass over the tracks, and if that inference was justifiable, to also say that the plaintiff, as employee, trusted to the judgment of his superior. If that were the case, then the true rule would be that laid down by Mr. Justice Mestrezat in Williams vs. Clarke, 204 Pa. 416, which we gave to the jury for their guidance and which reads as follows: 'We think the facts in this case bring it within the well recognized rules laid down in the text books and in our own decisions. The true rule in this case, as in all other cases, is that if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous.'"

It will be noticed that the facts in our case are strikingly similar to Glew vs. Pittsburgh Railways Company, supra, as appears from the following extract of testimony:

By Mr. Pritchard:

Q. Why were you afraid?
A. I saw that stone was a large one, and I was afraid to put my arm under it.
Q. What were you afraid of?
A. I was afraid to put the piece of iron under.
Q. What were you afraid would happen?
A. The rock was like to fall on my arm.
Q. Did you tell Humphrey Davis you wanted to go after something to shove it under?
A. Yes, I told him, and he told me, 'Go ahead and put under the stile; put under the stile.'
Q. Just give the words that you used as near as you can recollect them.
A. Get him something to put in the stile.
Q. Please repeat, as near as possible, just what you said to Humphrey Davis. Use the words as nearly as you can recollect them.
A. That is all Humphrey Davis has said, 'Go ahead, go ahead.'

By the Court:

Q. Mr. Pritchard is asking you now what you said to Humphrey Davis, your exact words.
A. Get something for to put in the stile, on the block.

By Mr. Pritchard:

Q. What had you usually used before to put the wedge under?
A. I was using sometimes a hook and also the shovel."

(Trans. pp. 15-16)

The Superior Court of the State of Pennsylvania, in the case of Franczak vs. Nazareth Cement Company, 42 Pa.

Super. Ct. 263, laid down the same rule where a workman was hurriedly attempting to cross a track to avoid an approaching car and was directed by the foreman to stop and remove a stone on the track, with the assurance from the foreman that there was plenty of time for him to do so and get away, but while performing the work directed by the foreman he was injured, and it was held that:

> "A servant is not required to act on his own judgment against that of his employer, and if the latter gives him positive instructions to go on with a particular task, he may recover for any injury received if the work is not imminently dangerous."

A case presenting almost similar facts is the case of Moleskey vs. South Fork Coal Mining Co., 247 Pa. 434, which was a case where an employee in a mine complained to the superintendent of the danger from a threatened fall of rock forming part of the roof of the mine heading, and that the latter, after testing the roof with a pick, assured the plaintiff that it was safe and instructed him to proceed with the work. The Court was asked to hold as a matter of law that because the plaintiff knew of the threatened danger and had complained of it to the mine superintendent, that he was guilty of contributory negligence and the Court should so instruct the jury as a matter of law. The Court submitted the question to the jury, and on an appeal the Supreme Court, in an opinion by Mr. Justice Elkins, said:

> "A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding misgivings of his own."

Mr. Justice Elkins further, in commenting upon the elements which must be considered by the jury when he is acting under the express instructions of the foreman stated as follows:

"Even the rule as thus stated is subject to the qualification that the servant is not warranted in proceeding with his work, if it was inevitably and immediately dangerous to do so, but what tribunal shall determine whether the work was inevitably and imminently dangerous? This necessarily depends upon the facts. It is sometimes for the Court and sometimes for the jury. In the present case, plaintiff had misgivings about the falling of the rock from the roof of the heading, but he was not sure about it, and sent for the superintendent for the purpose of calling his attention to what he apprehended might be an impending danger. When the superintendent assured him that the rock would not fall and ordered him to proceed with the work he obeyed his instructions. Was he justified as a man of common prudence in acting upon the judgment of the superintendent under these circumstances? Was the danger so obvious and imminent as to make it his duty to refuse to continue work when directed to proceed by the superintendent? Appellant argues that appellee admitted on the witness stand that he knew the danger was imminent and by his own admission is precluded from recovering damages in this action. But in this connection we must consider all of his testimony, in order to understand what he meant by the word 'imminent,' which was used by counsel in asking the question and not by the witness in answering it. The explanation of the witness was that while he had misgivings about the safety of the overhanging rock, he concluded after the superintendent sounded the same with his pick and assured him it would not fall, it was safe for him to continue work. That it was a truthful statement was shown by the fact that he did continue to perform the work he was directed to do. He did not know that the rock would fall, and perhaps no one, not even the superintendent, could have determined definitely in advance what would happen. Under all the circumstances of this case we cannot declare as a matter of law that plaintiff was so clearly guilty of contributory negligence as to preclude a recovery. This was a question for the jury and it was so submitted in a careful and painstaking charge by

the learned trial Judge. Ample authority for this position will be found in the following cases: Patterson vs. Railroad Co. 76 Pa. 389; Williams vs. Clarke, 204 Pa. 416; Glew vs. Railways Co. 234 Pa. 238; Collins vs. Coal Co., 241 Pa. 55."

We, therefore, respectfully submit that not only did the Circuit Court of Appeals err in affirming the judgment and opinion of the court below as to the instructions given, but also erred in sustaining the giving of instructions by a trial judge not in open court, not in the presence of counsel, nor with the consent of counsel or their clients. It will once for all subject the jury to an influence which will hardly be kindly received by litigants—the giving of secret instructions when neither they nor their counsel are present so that they can hear what is said to the jury, and it once for all destroys the tradition that a trial is to be held in open court from beginning to end. A litigant who has lost his case will hardly be able to banish from his mind an ever arising "suspicion" as termed by Mr. Chief Justice Parker in Sargent vs. Roberts when the trial judge himself said in the opinion on the motion for a new trial, "That the practice here adopted does not deserve encouragement," and this self-imposed criticism is followed by the Circuit Court of Appeals upholding the act of the trial judge in "we do not say that harm could never happen in the exchange of such a question and answer; the variety and complexity of human affairs are so great that the same act may have a different quality if the atmosphere be different that surrounds it; but so far as we can see, harm is not probable. We agree fully that modification of established practice should be allowed with caution, and we see excellent reasons why every step in a trial up to the rendering of the verdict should be taken in open court, and (wherever practicable) in the presence of counsel also." We are at a loss to understand just what is meant by the learned Circuit Judge's distinction by saying that the "same act may have a different quality if the atmosphere be

different that surrounds it." We assume and have been taught to assume that the atmosphere surrounding a court of justice is the same in Maine as in California, and should be the same in Pennsylvania. And if this practice is dangerous in some atmospheres in a court of justice at some future time it might even become dangerous in the State of Pennsylvania.

What seemed to be viewed as a practice bearing the seeds of probable danger under certain circumstances was classified by Mr. Justice Parker in Sargent vs. Roberts, supra, as an inevitable source of mischief tending to the lowering of the people's confidence in the courts. So timely are his criticisms of this practice that we will ask the court's indulgence for quoting the following extract therefrom:

> "No communication whatever ought to take place between the judge and jury after the cause has been committed to them by the charge of the judge, unless in open court. . . . The only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case except in open court in the presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of the jurors is of small consideration compared with this great object. . . . . It is better that everybody should suffer inconvenience than that a practice should be continued which is capable of abuse or at least of being the ground of uneasiness and jealousy."

If the "right of trial by jury shall be preserved," we respectfully submit it must be in open court and should not be swept away by secret influences in the form of private communications not made known to the parties or their counsel.

THIRD POINT

The judgment affirmed by the Circuit Court of Appeals for the Third Circuit should be reversed and a new trial awarded.

Respectfully submitted,

J. Willard Paff,
Calvin F. Smith,
Attorneys for Petitioner,
Easton, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918. No. 241.

Donatto Fillippon, Plaintiff in Error,

vs.

Albion Vein Slate Company, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

COUNTER STATEMENT OF THE CASE.

The plaintiff, a man of full age, was employed as what is known as a rubbish hand, in a slate quarry. He had been so employed for a little over a year and a half,—nearly all of that time in the quarry of the defendant. The work at the quarry was under the direction of a superintendent, with five gangs under him, each gang consisting of four quarrymen or block men, and either one or two rubbish hands to each gang. The slate quarry is an open hole. After a block of slate is quarried, it is raised by crowbars and wedges or stiles inserted under it in order that chains may be put around it for hoisting it out of the quarry. If the block is small the wedges are put under by hand, it not being necessary to insert the hand beyond the edge of the

block. If the block is large the wedges are put in by hand so far as can be done without putting the hand under the block and then a stick or shovel handle or hammer handle is used to push the wedge further under, so that the hand of the operator who is putting the wedge under will not be under the stone in case it should accidentally drop. The rubbish hand was a helper to the four quarrymen, and did generally whatever they directed him to do in the way of helping them. They were all under the direction of the superintendent. As has been said, Fillippon had had a year's and half experience, and was perfectly familiar with this method of doing the work. On the day of the accident, a large block had been quarried, and was being raised for the purpose of putting chains under it. One of the quarrymen directed Fillipon to put a wedge under, and he put a small wedge under as far as he could do so without getting his hand under the stone, then seeing that the block was a large one, and that he would have to put the wedge further in, he was afraid to do so for fear the block might fall on his arm, and he told the quarryman that he wanted to go get something to shove the wedge under. According to his story, the foreman then said to him, "Go ahead, go ahead," and he then shoved the wedge further under the block, putting his arm in for that purpose. The block slipped and crushed his arm.

The defendant asked for binding instructions, on the ground that the danger was an obvious one, known to the plaintiff, and that the evidence rebutted any inference that he did not understand the danger or that he relied upon any superior knowledge of the quarryman. The trial Judge, however, thought that in view of the evidence that the plaintiff was obeying the commands of the quarryman, it was for the jury to say whether he fully understood the danger, and acted as a reasonably prudent man should. The case was submitted to the jury. The Court adjourned. Subsequently, another Judge began a trial in the room vacated by the trial Judge, and pending this trial, and while the trial Judge was in chambers, a written question was sent by the jury to the Judge and an answer in writing

sent by the Judge to the jury, both question and answer being preserved on the record, and an exception granted subsequently to the plaintiff at his request. The jury found a verdict for the defendant.

ARGUMENT.

The plaintiff in error argues his case upon two propositions.

First.—That it is reversible error under any circumstances for a trial Judge to give additional instructions to the jury except in open Court.

Second.—That the substance of the instructions was wrong.

If the substance of the instructions was wrong, of course, the method of giving them is of little consequence and this appeal should be sustained. On the other hand, if the substance of the instructions was correct, the method of giving them is important only if it injuriously affected the plaintiff, and if no injury has resulted or could have resulted, the case ought not to be sent back for a mere technical error.

So far as the substance of the instructions is concerned, very little need be said. They were substantially a repetition of what was said on the same subject in the charge of the Court before the jury retired. At the time the plaintiff was apparently satisfied with the charge for he took no exception. Nor does he even now point out any error. On the contrary, he argues the proposition as though the Court had taken the case from the jury and the only authorities he cites are to the effect that the question of plaintiff's negligence in a case such as this is for the jury and not for the Court. As the Court left the question to the jury, it is hard to see what application this line of argument can have, or what purpose is served by the citation of authorities upon a point which is not in question, unless it be to confuse the Court, by suggesting error where none can be pointed out.

This brings us to the only real question in the case, viz.: Was there such error in the method of giving the instructions that the case must be sent back for a new trial, notwithstanding the substance of the instructions was correct and no harm has been done the plaintiff?

Appellant contends that if any communication passes between the Court and the jury, except in the presence of counsel and in open Court, the judgment must be reversed even though the communication was proper and no possible harm could have been done to either party.

It will of course be conceded that under ordinary circumstances it is the better practice for the Court to hold no communication with the jury except in open court and in the presence of counsel. The Court below in its opinion so states. It is, however, a very different proposition to say that there is an absolute rule of law with regard to such communications that irrespective of any error in the instructions or any injury to the parties by this method of giving them the verdict must be set aside or the judgment thereon reversed.

It is true that the rule has been stated without qualification by a number of text writers and in a number of opinions in the State Courts and the history of how this happened is rather interesting.

Apparently the first appearance of the rule on either side of the ocean was in the case of

Sargent *vs.* Roberts, 1st Pickering 337.

In that case there was a statute of Massachusetts which provided where the jurors returned into Court and stated that they were unable to agree, the Court might give them further instructions and send them out again for further deliberation. The Court received a written request from the jury to be discharged because they could not agree, and sent a written communication refusing to discharge them, and giving them certain instructions. The Supreme Court held that no communication ought to take place between a judge and jury after the cause has been committed to the jury, unless in open court, and where practicable in

the presence of counsel. The rule as stated although probably quite correct, in view of the Massachusetts Statute, and under the circumstances of the particular case, was stated without qualification by the Chief Justice, and has in a number of cases in other States been without question stated as an absolute rule.

In many other cases, however, the Courts have refused to recognize it as an absolute rule, but merely as a rule of practice, the infraction of which may or may not be reversible error, according to the circumstances of the case, and this it is submitted is the sensible doctrine. Wherever there is any suspicion of undue influence or the record of the communication has not been preserved, the Court ought, of course, to reverse, but where the communication is in writing and made part of the record and no injury has been done, the Court, it is submitted, ought not to reverse an otherwise just judgment, because of a mere technical irregularity.

In the Note to

State *vs.* Murphy, 17 Lawyers Report Ann. N. S. 609.

cited in appellant's brief, the annotator has collected most of the cases in the State Courts and has cited some fifty cases in which the principle has been laid down that a communication between the Court and jury not in open court or in the presence of counsel constitutes reversible error and some thirty-eight cases in which it has been held that such communication was not reversible error if no prejudice resulted. To these should added the opinion of the learned Circuit Judge, in this case, than whom none of the authorities quoted on either side of the proposition is entitled to more respect. The apparent numerical supremacy in favor of the rule disappears when it is considered that many of the cases in which the rule has been broadly stated (usually quoting the case of Sargent *vs.* Roberts, 1 Pickering 337 *supra,*) are cases in which, as in the Pennsylvania case of Somer *vs.* Huber, 183 Pa. 162, no record of the communication has been preserved; some like Com'th

vs. House, 6 Sup. Ct. 92, are criminal cases and the decision is specially put on that ground and many others are cases in which there was suspicion of undue influence or there was some prejudice to the parties in the character of the communication.

It is a significant fact also that the very Court which first announced the absolute rule relied upon by appellant has in its later opinions discarded it, and in the case of

Moseley *vs.* Washburn, 165 Mass. 417,

announced the more reasonable rule that communications between Court and jury in the absence of counsel, and not in open court, may or may not be ground for reversal according to the circumstances of the case dependent upon whether prejudice to the parties has resulted therefrom.

The leading case in favor of the qualified rather than the absolute rule is

Shapley *vs.* White, 6 N. H. Rep. 172.

It is so close to the present case in its facts that the report is quoted in full as follows:—

> "Trespass, *quare clausum fregit.* Plea, general is-
> "sue. The action was tried at the common pleas sit-
> "ting in April.
>
> "In order to maintain the defence the defendant at-
> "tempted to show that he had been in the peaceable
> "possession of the *locus in quo* for more than twenty
> "years next preceding the commencement of the suit.
> "The cause was committed to the jury just before the
> "adjournment in the afternoon and about ten o'clock
> "in the evening the jury sent to the Court, at their
> "chambers, a written memorandum, as follows:
>
> " 'The jury wish to be instructed what would
> " 'amount to an interruption of peaceable possession if
> " 'your Honors think proper.
>
> " 'N. W. FOREMAN.'
>
> "To this request of the jury the Court returned an
> "answer, in writing, in these words:
>
> " 'An entry upon land, claiming title, made with the
> " 'knowledge of the adverse party, is an interruption

" 'of peaceable possession. The jury must form their " 'own opinion from all the facts in the case, both as " 'to the fact of peaceable possession and whether the " 'same has been interrupted or not.'

"The counsel of the parties were not present, but "the jury were directed to bring the question and an- "swer with them into Court; on the return of their "verdict, which was done.

"The jury having returned a verdict for the plaintiff "for twenty-five cents damages.

"Coolidge, for the plaintiff, moved for a new trial "on account of the instructions having been given as "aforesaid, and the action was, thereupon, transferred "to this Court upon a case saved. The counsel for the "plaintiff cited and relied upon,

"Sargent *vs.* Roberts, *et al.*, 1st Pick. 337. H. Hub- "bard and Chase, for the defendant. Parker, J., de- "livered the opinion of the Court. In the case cited "by the counsel for the plaintiff, the jury sent word "to the judge that they could not agree and request- "ing his directions, to which he returned for answer, "that so much time had been consumed in the case that "he was unwilling they should separate, 'and giving " 'such directions as would enable them to reconsider " 'the cause in a more systematic manner.' We have "no difficulty in acquiescing in the propriety of a de- "cision granting a new trial, under those circumstances. "There was no application to the judge for any direc- "tion upon any matter of law, arising in the case, nor "was it suggested that the disagreement arose upon any "diversity of opinion among the jury upon any ques- "tion of law involved in it. The instructions were, "therefore, in fact, a new charge to the jury, and this "not at their request. The reasoning of the opinion "in that case, however, goes beyond the facts in the "case, and would preclude the Court from giving, after "an adjournment, any answer to a question of law or "fact without the presence of the counsel, and should

"we adopt the broad rules there laid down, the ver-
"dict in this case must be set aside.

"Before coming to this conclusion, however, it may
"be proper to advert to the situation of this case, at the
"time the instructions were given.

"The case had been committed to the jury, they had
"retired, and the Court had adjourned until the next
"day. The question from the jury was sent at an hour
"when it was extremely inconvenient, if not impracti-
"cable, to assemble the counsel of the parties, and if an
"answer could not be given, as was done in this case,
"the jury must have been left in confinement during
"the night, for want of intelligence upon a point of
"law which might be important in the case, and to
"which the attention of the Court had not been called,
"or upon which the jury had not sufficiently understood
"the directions. Or, in order to escape this hardship,
"the jury might have been induced to agree upon a ver-
"dict upon such conjecture as they were able to form,
"upon the point in question and in the latter case, had
"they mistaken the law, there would have been no way
"of correcting the error; whereas, in the mode adopted
"they would be enabled to come to an intelligent re-
"sult, and, if the Court erred in the instructions, the
"error could be rectified in the same manner as if the
"instructions had been given in open court; and there
"could be no uncertainty as to what directions were
"in fact given.

"It would seem, then, that there could not be any
"prejudice arise to either party from the course
"adopted.

"The jury were relieved from any necessity of re-
"maining until morning, because they could not pro-
"ceed for want of sufficient knowledge of the law; and
"the hardships of juries, although much less than they
"were formerly, are still quite sufficient without impos-
"ing upon them any unnecessary burden.

"The parties had the advantage of having a con-
"sideration of the case, by the jury, with all the in-

"formation upon matter of law that was desired, and "were not exposed to the danger of a result founded "upon conjecture, which, if mistaken, would have been "beyond remedy.

"The Court gave the jury no directions or intima- "tions in relation to the facts of the case, and in per- "forming their appropriate duty, of instructing them "upon matter of law, placed the instruction in such "form that as full opportunity was afforded for excep- "tion to it as can exist in any case.

"No exception to the law itself, as given to the jury, "is suggested.

"If, then, no prejudice has arisen, or can arise, to "either party by such mode—if the ends of justice are "likely to be promoted in this way, while by refusing "an answer the rights of the parties might be left in "some measure to chance, or an unnecessary hardship "imposed upon the jury, the reasons against granting a "new trial are very strong.

"There is nothing in the nature of an adjournment, "according to the practice here, which will lead to a "different result.

"It is the common course to consider such business "as can be conveniently transacted at chambers during "an adjuornment.

"Petitions, and motions of various kinds, are con- "sidered, and claims and bills of cost examined and "allowed. The convenience of suitors and counsel is "thus consulted, and the business of the term facilitated; "and we discover no reason why the Court may not, "with equal propriety, answer a question of law pro- "pounded by the jury, if the rights of the parties are "fully secured, as was done in this case.

"There are two cases in Johnson's Reports which "bear upon this question.

"Thayer *vs.* Van Vleet, 5 Johns. 111, was a case on "*certiorari* from a justice court. At the trial before a "jury, the parties exhibited their proofs and the demand

"appeared to have been sufficiently supported. After "the jury had retired they sent for the justice, who "went to the room where the jury were sitting, and "one of the jury asked him whether they could add any- "thing to the charge of the plaintiff, and the justice "answered no, and left them without anything further "being said. The Court held that the fact of the "justice going to the jury and answering the question "of law put to him, was not an irregularity for which "the verdict ought to be set aside—that there was no "semblance of abuse, and the consent of parties might "be inferred.

"In Bunn *vs.* Croul, 10 Johns. 239, it was held that it "was irregular for the justice, after the jury had re- "tired, to answer a question from them whether a "particular point of evidence had been given, stating "the evidence. A controversy might arise as to the "correctness of the statement, which, as a matter of "fact, could not be settled and corrected by the Court, "as matter of law may.

"The principle to be deduced from these cases seems "to be a sound one. If the jury, after an adjourn- "ment, put a question, respecting the facts of the case, "to the Court, it will be irregular to state the evidence "relating to it; but if they desire instruction, upon a "mere question of law, that may be answered. It "should, undoubtedly, be answered in such way that the "parties may have an opportunity to have it corrected, "if there is any error in the answer, and in this way "all the rights of both parties are secured as effectually "as if the answer was given in open court."

This was followed in

Milton *vs.* Bragilor, 23 N. H. 507;
Bassett *vs.* Salisbury, 28 N. H. 438;

and in the cases cited in the note to

State *vs.* Murphy, 17 L. R. Ann. N. S. 609.

The law is admirably stated by the Court in the case of Buntin *vs.* Danville, 93 Virginia Reports, 213, as follows:—

> "The fifth bill of exceptions relates to the action of "the Court in replying to a question from the jury "without informing counsel until after the rendition of "the verdict. The question of the jury, and the an- "swer of the Court, were both in writing, and are set "out in the record. The reason given by the Court "for not informing counsel before replying to the ques- "tion was that they were engaged in arguing another "case to a jury. Still it is the better practice to ap- "prise counsel of any question asked by the jury that "may affect the case before an answer is returned by "the Court. Argument or other proceeding can al- "ways be suspended for a few moments without seri- "ous interruption. This course should always be pur- "sued, and ground for an exception of this character "be avoided. The answer returned by the Court to "the question propounded by the jury correctly stated "the law, and the irregularity excepted to is not suffi- "cient to vitiate a verdict that is plainly right upon the "evidence and the law applicable thereto.
>
> "For the foregoing reasons, the judgment of the "Corporation Court must be affirmed."

The learned Circuit Judge was entirely right in saying that the Federal Courts had not yet passed upon this question. The cases cited by plaintiff in error, viz:—

Stewart *vs.* Wyoming Cattle Ranch Co., 128 U. S. 383;

Yates *vs.* Whyel Coke Co., 221 Fed. 603;

Aerheart *vs.* St. Louis etc. Ry. Co., 99 Fed. 907.

do not support his contention. On the contrary these cases hold that it is not reversible error for the Court to give the jury additional instructions after they have retired, without sending for counsel.

This narrows the case down to the single point whether a just judgment after a fair trial and after correct instructions to the jury is to be reversed because an entirely correct written answer to a written question was given without going through the formality of hunting up an unoccupied room, convening court and then doing exactly what was done by means of the written answer. It is clear that no prejudice resulted to the parties by the course actually pursued. The communication was in writing. The answer was in writing—both were preserved and put of record and an exception allowed. The answer merely repeated in substance what had been said in the charge. So far as it varied from the charge it was in favor of plaintiff, since the Court not only told the jury that to charge plaintiff with contributory negligence or assumption of risk they must find not only that he *fully* appreciated the danger, but that he did so after he had sufficient time to consider, and when no reasonable or prudent man would have done what he did.

The plaintiff's counsel was given the right to except. He could have had no more if he had been present, since he would have had no right to present requests for additional instructions or to require any addition to or variation of the instructions. This was settled in the case of

Maranda *vs.* Texas, &c. Railway, 124 Federal, 42,

in which the counsel was present, and requested that the Court add something to its instructions. The Appellate Court said:—

> "After the jury has retired, the functions of counsel "cease, and there should be no interference by them "with communications between the jury and the Court. "It is too late to present additional arguments or re- "quests. Information of what takes place should not, "however, be withheld from counsel, and they may "enter an exception to any action of the Court which "they deem prejudicial to their client's right."

The judgment was affirmed.

This is in accordance with the well settled rule and practice to the effect that no instructions can be asked for by counsel after the summing up of the case.

Keystone Bank *vs.* Safety &c. Co., 179 Fed. Rep. 727.

The only function which counsel could have served, had the written request been presented and answered in open court, would be to see that the request and instruction was entered on the record, and a bill of exceptions sealed, and inasmuch as the request and instructions in the present case were in writing, and were preserved, and a bill of exceptions was sealed thereto, no possible injury has been caused to the plaintiff. Nor has anything been done which is against public policy, since there were no secret communications and no oral interview between the Judge and the jury but simply a proper answer in writing to a proper request for additional instructions upon a point of law.

To summarize, the defendant in error respectfully submits:—

1. That there was no error in the substance of the instructions.

2. That the instructions were confined to the question of law upon which the jury asked additional instructions.

3. That there has been no possible injury to the plaintiff.

4. That under the circumstances the judgment ought not to be reversed for a mere technical error which was harmless.

RALPH B. EVANS,
For Defendant in Error.

FILLIPPON *v.* ALBION VEIN SLATE COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 241. Argued March 18, 1919.—Decided May 19, 1919.

In response to an inquiry from the jury, who had retired to consider of their verdict, the trial court sent them a supplementary instruction in writing on a question of contributory negligence. *Held* error, the parties and their counsel being absent and no opportunity being given them either to be present or to make timely objection. P. 80.

An opportunity afterwards to except to an instruction and to the manner of giving it is not equivalent to an opportunity to be present during the proceedings, since the prime and essential function of an exception is to direct the mind of the trial judge to the point in question so that he may reconsider and change his ruling if convinced of error. P. 81.

In jury trials erroneous instructions are presumptively harmful. P. 82.

An erroneous instruction may neutralize a correct one on the same subject and introduce material error. P. 83.

Under the law of Pennsylvania, a servant who goes on with perilous work under the peremptory orders of his master, although knowing the attendant danger and having time to consider, is not guilty of contributory negligence unless he knows, or has reason to suppose, that the danger is inevitable or imminent. P. 82.

242 Fed. Rep. 258, reversed.

THE case is stated in the opinion.

Mr. Calvin F. Smith, with whom *Mr. J. Willard Paff* was on the brief, for petitioner.

Mr. Ralph B. Evans for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case involves an important question of trial practice. It was an action brought by Fillippon, a citizen of Italy and a subject of the King of Italy, against the Slate Company, a Pennsylvania corporation doing business in that State, to recover damages for personal injuries sustained by plaintiff while in the employ of defendant, due as alleged to the negligence of defendant's foreman or superintendent under whom plaintiff was working. The grounds of negligence alleged were the failure to furnish a reasonably safe place for the work, failure to warn plaintiff of latent dangers of the work and the dangerous method of doing it, and specifically that plaintiff was directed to do the work in a particular manner under orders and

instructions of defendant's foreman, to which plaintiff was bound to conform. There was a general plea of not guilty and a trial by jury. The evidence showed that the occurrence took place July 31, 1914, while plaintiff was at work in an open quarry under the direction of a foreman or superintendent and as one of a gang consisting of four quarrymen or blockmen besides plaintiff who assisted them as an ordinary laborer or "rubbish hand." It appeared that by the usual method of work, with which plaintiff was familiar, after a block of slate has been blasted out it is raised by crowbars and by wedges of wood or iron placed beneath it, in order that chains may be placed about it to which the hoisting tackle is made fast. In case the block is small the wedges are placed by the workman's hand, it not being necessary to insert them beyond the edge of the block. In case of large blocks, the wedges are put in by hand so far as this can be done without placing the hand beneath the block, and then a stick or the handle of a tool is employed in order to push the wedge farther in, the workman being thus protected from injury in case the stone should happen to slip or drop. Plaintiff's duty as rubbish hand was that of a general utility man, expected to do whatever the foreman or superintendent might direct. On the occasion in question a large block had been blasted out and was being raised in order that chains might be put about it. Plaintiff was assisting, and had inserted a wedge as far as he could push it without putting his hand beneath the stone, but it was necessary that the wedge should be pushed farther in, and he, being afraid that if he did this with his hand the block might fall upon his arm, told the foreman or superintendent that he wanted to get something with which to push the wedge. Instead of consenting, the foreman ordered him to "go ahead, go ahead," and in obedience to this he put his right hand beneath the block, when with a sudden movement the block came down on

his arm and crushed it so that amputation was necessary.

The trial judge submitted the question of defendant's negligence and of plaintiff's contributory negligence to the jury, saying, in his principal charge, among other things: "When a man accepts employment he assumes also with it the ordinary risk incident to such employment, and if you find the circumstances or situation in which the plaintiff found himself at the time of the accident, or that his performance leading up to the injury was of ordinary occurrence, then you may conclude that he had assumed the risk of the accident that has befallen him, and he cannot recover; but on his part it is contended that the situation in which he found himself at the time when the stone or slate block, properly speaking, was suspended or lifted by the men was of an extraordinary character, that the plaintiff when about to place the iron wedge found the stone or block large, and threatening danger, as he believed, whereupon he was suddenly and hastily summoned and directed to act by the foreman, whereupon he had but little or no time to judge of his own safety, and yielding to the judgment of his superior he acted. Now, if you find the facts as contended for by the plaintiff, I will ask you to say whether he was guilty of contributory negligence under the circumstances. Could he have protected or saved himself by the use or exercise of ordinary care? If he is to blame in part, or has in any manner contributed to his injury, he is not entitled to your verdict. The rule in negligence cases is, that while the defendant is held to exercise due and reasonable care under the circumstances, the plaintiff is also held to exercise the same degree of care, and if he does not do so, he cannot recover. Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous. If the danger was

imminent that faced the plaintiff, and he in the face of it did the thing that he knew, as a reasonably careful man, under the circumstances, was dangerous, he is guilty of contributory negligence and cannot recover."

The bill of exceptions shows that after the trial judge had completed his instructions and the jury had retired for deliberation, and while they were deliberating, the jury sent to the judge the following written inquiry: "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by Foreman Davis to 'push it under.'" To which the trial judge replied by sending the following written instruction to the jury room, in the absence of the parties and their counsel, without their consent, and without calling the jury in open court: "If he was told to put it under as stated by the plaintiff and he did so, fully appreciating at the time the danger attending and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

To this action of the court plaintiff excepted at the first opportunity upon grounds that raise two questions: (a) Whether it was erroneous to give this supplementary instruction in the absence of the parties and without calling the jury in open court, and (b) whether the instruction so given was erroneous.

The jury having returned a verdict in favor of defendant, and a motion for a new trial having been denied, the resulting judgment was brought under the review of the Circuit Court of Appeals and there affirmed. 242 Fed. Rep. 258. Thereupon this writ of certiorari was allowed.

We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. See *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 390; *Aerheart* v. *St. Louis, I. M. & S. Ry. Co.*, 99 Fed. Rep. 907, 910; *Yates* v. *Whyel Coke Co.*, 221 Fed. Rep. 603, 608; and many decisions of the state courts collated in 17 L. R. A., N. S., 609, note to *State of North Dakota* v. *Murphy*, 17 N. Dak. 48.

The Circuit Court of Appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place and given the opportunity of excepting to the substance of the instruction and to the manner of giving it—no harm had been done, and none

was probable to arise under like circumstances, and hence affirmed the judgment.

It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348.

And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless.

In this case, so far from the supplementary instruction being harmless, in our opinion it was erroneous and calculated to mislead the jury in that it excluded a material element that needed to be considered in determining whether plaintiff should be held guilty of contributory negligence under the particular hypothesis referred to in the jury's question.

The case was governed by the law of Pennsylvania, where the injury was received and the trial took place. Rev. Stats., § 721. The law of that State, as it stood when the cause of action arose [1] is expressed in repeated decisions of its court of last resort to the following effect: "Where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely

[1] See Workmen's Compensation Act of 1915, Pa. Laws 1915, p. 736.

used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident." And, with reference to the particular circumstances of the case there under consideration: "If the defect was so great, that obviously, with the use of the utmost skill and care, the danger was imminent, so much so, that none but a reckless man would incur it, the employer would not be liable." *Patterson* v. *Pittsburg & Connellsville R. R. Co.*, 76 Pa. St. 389, 394. "If the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous." *Williams* v. *Clark*, 204 Pa. St. 416, 418. To the same effect, *Glew* v. *Pittsburgh Railways Co.*, 234 Pa. St. 238, 242, 243; *Moleskey* v. *South Fork Coal Mining Co.*, 247 Pa. St. 434, 437, 438.

In the present case the trial judge recognized this to be the applicable rule of law when orignally instructing the jury, for he said: "Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous." But this was neutralized, and the jury probably led astray, when in the supplementary instruction they were told, in effect, that if, when plaintiff obeyed the foreman's order by putting the wedge beneath the

block of slate with his hand, he fully appreciated the attendant danger and had sufficient time to consider, and if the situation was such as would have made a reasonably prudent man disobey the order, and he went ahead in spite of the dangers known to him and apparent, he was guilty of contributory negligence. The effect of this was to bar a recovery if the plaintiff knew of the attendant danger, although he did not know or have reason to suppose that the danger was inevitable or imminent, that is, immediately threatening. We suppose it hardly could have been a point in dispute that plaintiff knew that the operation of pushing the wedge beneath a large block of slate with his hand was dangerous, for he was familiar with the work, knew what safeguard was customarily taken against this danger, expressed a fear of it upon the particular occasion, and requested time to get an implement to be used for his safety according to the custom. It was at this precise moment, according to the testimony, that the foreman or superintendent told him to "go ahead, go ahead"; and under the Pennsylvania decisions he was entitled to rely upon the judgment and order of his superior if the work was not inevitably and imminently dangerous; that is, threatening immediate injury upon the particular occasion. The jury very reasonably might conclude that neither plaintiff nor the foreman believed or had reason to believe that the work was inevitably and imminently dangerous; but if it was not, he was entitled, under the Pennsylvania decisions, to hold his employer responsible for the consequences of what he did under peremptory orders of the foreman, although he (the plaintiff) fully appreciated the general dangers, had time to consider, and went ahead notwithstanding.

The judgment under review will be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.